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IN THE

Supreme Court of the United States

October Term, 1918

No. 715

THE COLUMBUS RAILWAY, POWER AND LIGHT COMPANY

Appellant

vs.

THE CITY OF COLUMBUS, OHIO, *et al.*

No. 739

I. TUCKER BURR, *et al.*

Appellants

vs.

THE CITY OF COLUMBUS, OHIO, *et al.*

Appellees

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Brief for Appellants, Plaintiffs Below

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BRIEF FOR APPELLANTS, PLAINTIFFS BELOW

STATEMENT OF THE CASE

The Columbus Railway Power and Light Company instituted the first suit by filing its original bill followed by an amended bill against the City and its officers and I. Tucker Burr *et al.* instituted the second suit by filing a

bill against the same defendants. I. Tucker Burr *et al.* are the owners and holders of more than $200,000 of the First Refunding and Extension Sinking Fund Mortgage Five Per Cent. Gold Bonds issued by The Columbus Railway, Power and Light Company. All of these bondholders are citizens of states other than the State of Ohio.

The Columbus Company for some years prior to August 20, 1918, owned the street railway system in the City of Columbus and operated it under two certain ordinances of the City Council of said City adopted in the year 1901, which granted franchises to predecessors of the Columbus Company. Copies of these two ordinances are attached to each of the two bills, marked Exhibits No. 1 and No. 2. Each franchise grant contained a rate schedule requiring the grantee, its successors and assigns, to issue and sell eight tickets for twenty-five cents with universal free transfers. The Columbus Company, under the rate provisions of each of these ordinances, issued and sold eight tickets for twenty-five cents with universal free transfers for a number of years prior to August 20, 1918. On that date the Columbus Company presented a letter of notification to the City of Columbus surrendering and abandoning all of its rights under these two franchise grants and stating as its reason therefor that its operating expenses had increased to such an alarming extent, due primarily to the war, that the rates of fare prescribed in the two franchise grants had become confiscatory, and that, although it had made various efforts commencing in February, 1918, and running down to the time of notice, to secure higher rates from the City Council, it had been unable to secure any relief whatever. The Public Utility Commission of Ohio has no jurisdiction over street railway rates fixed by City ordinance. In surrendering and abandoning these two franchise grants the company reserved all rights under certain perpetual franchises owned by it to operate on certain streets in the city.

The Columbus Company is also engaged in the generation and sale of electricity for light and power purposes and

since the war broke out has furnished power for a great many war industries located in the City of Columbus and in territory adjacent thereto; and the Company has also furnished transportation facilities for the employes of these war industries as well as for a large number of soldiers located at the Columbus Barracks.

In the month of June, 1918, the conductors and motormen employed by the Columbus Company struck for higher wages and, after unsuccessful negotiations, the controversy was referred to the National War Labor Board, which filed its award July 31, 1918, increasing the Company's annual wage account payable to its street railway employees by $560,000. With this large increase in the wage account, coupled with corresponding increases in the cost of all materials and supplies, the Company, immediately prior to presenting its letter to the City Council on August 20, 1918, a copy of which appears as Exhibit No. 3 to the bill in each case, estimated that its operations under the prescribed schedule of rates were not producing enough money to pay its annual operating expenses, depreciation and taxes by about $250,000 so that there would be no possibility of paying its bond interest and no income to yield any return whatever upon the value of the property employed in furnishing street railway service to the people of the City.

The surrender and abandonment of the franchises was based upon the impossibility of furnishing service at the rates of fare prescribed in the franchise grants. Immediately after said surrender and abandonment the company put into operation a new rate schedule requiring passengers to pay five cents for a ride on the cars and one cent additional for a transfer. At the same time the company filed its bill against the City of Columbus *et al.*, being No. 715 upon the docket of this court, and several weeks later I. Tucker Burr *et al.* filed their bill against the City of Columbus *et al.*, being No. 739 upon the docket of this court. The first case, being the one instituted by the Columbus Company, No. 715 upon the docket of this Court, was

heard on September 4, 1918, by Judge WESTENHAVER upon plaintiff's motion for a temporary restraining order and preliminary injunction and upon defendants' motion to dismiss the action. Judge WESTENHAVER overruled plaintiff's motion and sustained defendants' motion. A copy of his opinion appears in the transcript of record of No. 715 at pages 77 *et seq.* The bill in the second case, No. 739, was filed on the 16th day of September, 1918, and was heard on the 10th day of October before Judge HOLLISTER upon a similar motion filed by plaintiffs for a temporary restraining order and preliminary injunction and upon a similar motion filed by defendants to dismiss. Judge HOLLISTER overruled plaintiffs' motion and sustained defendants' motion. Judge HOLLISTER's opinion appears in the transcript of record of No. 739, at pages 53 *et seq.* The two cases were brought by appeal to this Court from the judgments and decrees entered in pursuance of the two opinions mentioned above.

SPECIFICATIONS OF ERROR

In each of the above-entitled cases the District Court erred in overruling the motion for a restraining order and temporary injunction and in sustaining the motion to dismiss the action and also in holding that the Court had not jurisdiction; the errors of law committed being the following:

(a) In holding that the franchise grants bound the Company to continue to operate thereunder notwithstanding the fact that said grants, according to the natural interpretation of the language used, were permissive only; and

(b) In holding that the obligations of the franchise grants (assuming they imposed obligations to continue to operate thereunder) could be enforced notwithstanding the uncontemplated situation brought about by the war, which resulted in abnormal increases in operating expenses and

so changed the nature of the grants considered as contracts that they became substantially new contracts; and

(c) In holding that the 14th Amendment to the Constitution of the United States was not a protection to the Company against the enforcement of the rate schedules prescribed in the franchise grants.

ARGUMENT

The claim of the appellees is based upon the proposition that the two franchise grants represent contracts and that these contracts impose obligations upon the Columbus Company to continue operating its street railway lines under these franchise grants and to charge the rates of fare therein prescribed. The position of the plaintiffs and appellants may be summarized as follows:

1. The franchise ordinances granted permission to operate street cars on the streets of the city upon the terms and conditions therein prescribed, and the Company was bound to comply with these terms and conditions so long as it continued to exercise the franchises, but these grants were permissive only, and have been surrendered and abandoned by the Company. Its reasons for such surrender and abandonment were that the rates of fare prescribed in the grants were no longer compensatory, but, on the contrary, had become confiscatory.

2. The situation that has been brought about by the war, resulting in a most unexpected increase in operating expenses of all kinds, and particularly the compulsory annual wage increase of $560,000 due to the award of the National War Labor Board, cannot be held to have been within the contemplation of the parties when the franchises were granted and accepted, and under these circumstances the Company is entitled to a release of the obligations, if any, that these grants may have imposed upon it to continue to operate under them.

3. The 14th Amendment is a complete protection against the enforcement of the confiscatory rates prescribed by the legislative enactments represented by these two franchise grants.

The reason for this controversy is that the rates prescribed by the two franchise grants do not yield enough money to represent a fair return to the company upon its investment. A street railway schedule of rates which requires the company to sell eight tickets for twenty-five cents is an impossible rate schedule under existing conditions; under any conditions it is extremely low. The figures shown in the bills in these two cases disclose the fact that for each ride on the street cars, including a ride on a transfer as a separate ride, the company receives an average of 2.6 cents per passenger.

The amount of bonds properly chargeable against the street railway lines was figured in the bill filed in case No. 715 at $7,295,000. This represents a part only of the entire outstanding bonds of the company. Another and more accurate basis of figuring, which was adopted when the bill in No. 739 was filed, shows that the amount of bonds properly chargeable against the street railway lines was $8,600,000. The only material difference, for the purposes of these cases, that this difference in figures makes, is that the amount by which the company failed to earn its interest on the bonds properly chargeable against the street railway lines for the twelve months ending June 30, 1918, in the first case was shown to be $31,000, and in the second case approximately $100,000. In the first case the figures showed that for the year named the company earned barely enough to pay 2½% upon the value of its property employed in furnishing street railway service to the people of the city. In Judge WESTENHAVER's opinion the figure is named several times as 4½%. This was an error and not borne out by the allegations of the bill. The statement for the year ending June 30, 1918, was bad enough under any circumstances, but the estimates for the year ending June 30, 1919, after the War Labor

Board had increased the annual wage account by about $560,000, shows a very distressing situation. It appears by these estimates that the company will fall short annually by approximately $250,000 of paying its operating expenses, depreciation and taxes and that there will be nothing left with which to pay interest on bonds, or to represent any return whatever to the company upon its invested capital. This situation necessarily spells impending bankruptcy and this is alleged in the bills.

Questions of jurisdiction are presented at the threshold of these cases. The jurisdiction of the Federal Court is denied by defendants and also jurisdiction in equity.

I

JURISDICTION OF THE FEDERAL COURT

Appellants contend that in each case the bill presents a Federal question and jurisdiction is claimed on that account. This Federal question arises out of the 14th Amendment. Appellants contend that the 14th Amendment is a complete protection against the enforcement of the confiscatory rates of fare prescribed by each of the two franchise grants. The Company does not claim the benefits of these grants. On the contrary, it has surrendered and abandoned them and it is not therefore in a position where the appellees can claim that it is undertaking to retain the benefits of the two grants and to deny liability to meet their burdens. These two grants are legislative enactments of the City under delegated power. They are laws enacted by the City under authority delegated to it by the State. The 14th Amendment prohibits the States from making or enforcing any law which shall abridge the privileges or immunities of citizens, and from depriving any person of life, liberty or property without due process of law. Such deprivation may be caused by making or enforcing a law or by any other action of the State or of the City under State authority. In this particular case the deprivation of which the

appellants complain is the threatened enforcement of the two laws, evidenced by the two franchise ordinances. The nature of the ordinances and of the obligations imposed by them is fully discussed below under a separate heading, and also under another separate heading the application of the 14th Amendment is discussed. Appellants present with confidence the proposition that the 14th Amendment is a complete protection to them against the enforcement by the appellees of the franchise grants with their confiscatory rate schedules but, if for any reason appellants are mistaken in this contention, it does not follow that the Federal Court has not jurisdiction. On the contrary it is well settled that, if the Federal question presented is a real question, as distinguished from a fictitious question, presented for the purpose of conferring jurisdiction, the Court will retain jurisdiction, even though it may decide the Federal question against the contention of the party presenting it, or even though it may omit to decide the Federal question at all, but may settle the issues between the parties by deciding some local or state question that is also presented. These propositions are fully sustained by the following cases:

City Railroad Co. vs. Citizens' St. Ry. Co., 166 U. S. 557, 563;

Penn Mutual Life Ins. Co. vs. Austin, 168 U. S. 685, 694;

Siler vs. Louisville & Nashville R. R. Co., 213 U. S. 175, 191;

Ohio Tax Cases, 232 U. S. 576, 586;

Greene vs. Louisville Interurban & R. Co., 244 U. S. 499, 508;

Des Moines City Railway Co. vs. City of Des Moines, 151 Fed. 854, 859.

Judge WESTENHAVER in his opinion in Case No. 715 (Record, p. 86) recognized the soundness of the proposition for which the above cases are cited, but held that the alleged Federal question upon which appellees rely for the jurisdic-

tion of the Federal Court is only a fraudulent and fictitious Federal question. In support of this view he cites the following cases:

Penn Mutual Life Insurance Co. vs. Austin, 168 U. S. 685;

St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 142;

Defiance Water Co. vs. Defiance, 191 U. S. 184;

Barney vs. New York, 193 U. S. 430;

Des Moines vs. Des Moines &c. Railway Co., 214 U. S. 179.

The case of *Penn Mutual Life Insurance Company vs. Austin,* 168 U. S. 685, is one of the cases upon which we rely to sustain the jurisdiction of the Federal Court. The law is stated as we have stated it above, but the decision in that case was based upon the *laches* of the plaintiffs. All of the jurisdictional questions were for the purposes of the argument admitted, and the bill was dismissed on the ground of *laches* only.

In *St. Paul Gas Light Co. vs. St. Paul,* 181 U. S. 142, the company claimed that it had a contract, the obligation of which was impaired by a city ordinance. The difficulty with the plaintiff's case was that the city ordinance which it claimed impaired the contract was not a legislative act of the city under delegated State authority. It was not a subsequent act of legislation impairing a prior contract, and it is elementary that under such circumstances the contract impairment clause of the Federal Constitution does not apply. The ordinance in question directed the company to remove some lamp posts from the streets, and contained a declaration that the city did not intend thereafter to pay the company interest on the cost of construction of the lamps so directed to be removed. If this ordinance had been a legislative enactment, the Federal Court would have had jurisdiction. In the present case there is no doubt that

the franchise grants which the appellees threaten to enforce are legislative enactments and therefore State action, and within the prohibition of the 14th Amendment.

In *Defiance Water Company vs. Defiance*, 191 U. S. 184, plaintiff claimed protection under the contract impairment clause, but failed to sustain jurisdiction for the same reason as in the St. Paul case above, that is, the alleged impairment was not by any subsequent act of legislation. The Court said:

> "Clearly, this resolution was not a law impairing the obligation of the contract. It was merely the allowance of a claim for rentals, with a saving clause to prevent estoppel."

In *Barney vs. New York*, 193 U. S. 437, the plaintiff claimed protection under the due process clause of the 14th Amendment, but failed to sustain the jurisdiction of the Court because the act which he sought to have enjoined was not action by the State. The opinion discussing the 14th Amendment says (p. 437):

> "But that amendment prohibits deprivation by a State, and here the bill alleged that what was done was without authority and illegal."

And again (p. 437),

> "Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the State of New York within the intent and meaning of the 14th Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction."

In *Des Moines vs. Des Moines &c. Railway Co.*, 214 U. S. 179, Mr. Justice HOLMES, delivering the opinion, said (p. 183):

> "The ground of jurisdiction is that a resolution of the city council of that city is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and, if carried out, will take the property of the corporation without due process of law, contrary to the 14th Amendment."

The resolution upon which plaintiff relied as a law was then quoted, and the opinion continues (p. 184):

> "We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution, as distinguished from ordinance, under Iowa laws, we read this resolution as simply a denial of the appellee's claim, and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views."

If the State or city action which is alleged to impair a contract is not a subsequent act of legislation, jurisdiction does not attach under the contract impairment clause, and if it is not action by the State or by the city under delegated authority, jurisdiction does not attach under the due process clause.

It seems to us that all of these cases relied upon by Judge WESTENHAVER can be readily distinguished from the present two cases for the reasons stated above. The franchise grants here involved are clearly legislative enactments and the threatened enforcement of the rate schedules therein prescribed is threatened enforcement of a law; and, on that account, a Federal question is presented. If these franchise grants were simply contracts instead of being legislative enactments, there would be no basis for the application of the 14th Amendment and on that account the Federal Court would not have jurisdiction. The fact that these franchise grants are legislative enactments is fully established by the

authorities. See the case referred to, *infra*, page 24, where the nature of these grants is considered; also the following cases:

St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 142, 45 L. E. 788;

Dawson vs. Columbia &c. T. Co., 197 U. S. 177, 49 L. E. 713;

Cincinnati vs. Cincinnati & H. T. Co., 245 U. S. 446, 62 L. E. 170.

In the second case, No. 739, in which certain bondholders of the Columbus Railway, Power and Light Company are plaintiffs, jurisdiction in the Federal Court is claimed not only upon the ground that a Federal question is involved, but also because of diversity of citizenship.

In case No. 739, counsel for appellees in their argument below suggested a defect of parties because the company was not made a party and because neither the trustee of the mortgage nor the holders of the other bonds nor the mortgagor were made parties. No defect of parties was made a ground of appellees' motion to dismiss the action or the decree of dismissal. There is, we submit, no merit in the suggestion of counsel for appellees, since, under what we understand to be the established rule of this Court and of the other Federal Courts, the plaintiffs were entitled to bring and maintain the action without prejudice to the trustee or the other bondholders, and the mortgagor, the Columbus Company, was not an indispensable party.

Equity Rule No. 39;

11 *Cyc.* pp. 866-7;

1 *Foster's Fed. Prac.*, pp. 436-7;

Payne vs. Hook, 4 Wall. 425;

Omaha Hotel Co. vs. Wade, 97 U. S. 13;

Old Colony Trust Co. vs. Omaha, 230 U. S. 100;

Mercantile Trust Co. vs. Texas & P. Ry. Co., 51 Fed. 529;

Ex parte Haggerty, et al., 124 Fed. 441;

Carter vs. Fortney, 170 Fed. 463; affirmed in 203 Fed. 454;

Sioux City Terminal R. & W. Co. vs. Trust Co. of North America, 182 Fed. 124;

Hubbard vs. Galveston, etc., R. Co., 200 Fed. 504;

Toledo Tr., L. & P. Co. vs. Smith, 205 Fed. 643;

De Pauw University vs. Public Service Commission, 247 Fed. 183.

There is nothing to the contrary in the case of *Dawson vs. Columbia &c. T. Co.*, 197 U. S. 177, 49 L. E. 713. That was a suit by a mortgage trustee against the City of Dawson, and the mortgagor company was also named as a party defendant. Jurisdiction depended solely upon diversity of citizenship. The court said:

> "The Water Works Company (the mortgagor) is admitted to have been a necessary party and it, like the defendant city, was a Georgia corporation. * * * There was a pretence of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. * * * No difference, or collision of interest, or action is alleged or even suggested. If we assume that the plaintiff is more than an assignee of the city's contract to it (which we do not intimate) still, when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed (citing a number of cases)."

II

JURISDICTION IN EQUITY

Equity has jurisdiction to hear and determine these two cases. This question of jurisdiction is settled by this Court in the following cases:

Smyth vs. Ames, 169 U. S. 466, 517;
Detroit vs. Detroit Citizens Ry. Co., 184 U. S. 368;
Cleveland vs. Cleveland Ry. Co., 194 U. S. 517, 531.

In speaking of jurisdiction in equity, Judge WESTENHAVER said (Record, No. 715, p. 79):

> "The nature of the threats made and the means to which it is expected the city will resort to enforce its threats are not stated or shown."

And again (p. 86):

> "No threatened action of the city authorities is complained of, except that it may endeavor to enforce compliance by complainant with its contract. No charge is made that other than legal methods will be adopted for that purpose, and, in the absence of a statement clearly showing a threatened resort to illegal means, a Court must assume that the city officials will proceed in conformity to law."

The amended bill in No. 715, Section 14 (Record, p. 48) contains the following:

> "The plaintiff further charges that the defendants threaten, and will, unless restrained and enjoined by this Court, attempt to force it to continue to operate its street railway lines under said Blanket Franchise and said Central Market Franchise upon all of the streets of said city, including those streets covered by

the aforesaid perpetual franchises, and to force it to continue to issue and sell eight tickets for twenty-five cents and give universal free transfers; and that said threat of the defendants, if carried out, would compel the plaintiff to carry passengers upon its said lines at inadequate and confiscatory rates, in violation of said Fourteenth Amendment to the Constitution of the United States."

A similar averment appears in Section 16 of the bill in No. 739 (Record, p. 9). Section 17 in the amended bill in No. 715 (Record, p. 49) reads as follows:

> "The plaintiff further says that this amended bill of complaint presents a case within the jurisdiction of this court of equity in view of the controversies, confusion, risks and multiplicity of suits which would necessarily be occasioned by the resistance of the plaintiff to the enforcement of the inadequate and confiscatory rates of fare prescribed in the aforesaid two franchise ordinances, and that, in view of the public interests and the great number of people to be affected thereby, only a court of equity is competent to meet such an emergency and to determine once and for all and without a multiplicity of suits, matters that affect not only individual persons, but also the interests of the entire community in the use of the public streets of the City of Columbus and in the administration of the affairs of the plaintiff, a quasi-public corporation, operating lines of street railway in said streets."

Section 19 of the bill in No. 739 (Record, pp. 9, 10) contains the same averment.

A similar situation was presented by the bills therein filed in each of the three cases cited above. It was not stated in any one of the bills in those three cases that the city proposed to pursue any particular course to enforce the provisions of the objectionable legislation. It was enough to

confer jurisdiction in equity to show a situation such as is outlined in the above quoted Section 17 of the bill in No. 715 and in Section 19 of the bill in No. 739. Controversies, confusion, risks and multiplicity of suits are inevitable in any such situation. It is also evident that the public interests and the interests of a great number of people are affected; in fact the entire community. It is also of common knowledge that the property of such a public service company is and must be largely in the public streets and highways of the city, and so easily subject, in case of riot or other disturbance, to attack and destruction. The process of a court of law is not suitable to meet such a situation. Riders on the street cars may refuse to pay more than the stipulated rates and for failure to pay the rates charged by the company may be ejected. Suits may result. Punitive measures may be adopted by the city officers. Many emergencies may arise which only a court of equity is able to meet. The situation in Columbus is well shown by the letter of the Mayor to the President of the United States (Record No. 739, pp. 40, 41). As therein stated in substance present conditions are serious and threaten the general peace of the city; only the moment, the man and the incident may be necessary to cause an explosion; thousands of people are riding in the cars without paying fares and the company has instructed its conductors not to put them off, for the conductors are not equipped to handle irritated passengers who want to argue their rights, and that there is great danger of serious trouble.

The bills in these two cases pray for injunctions to restrain the defendants from enforcing the rate schedules prescribed in the two franchise ordinances and from enforcing the ordinances or any provision of either of them. The company could not afford to wait for the city to commence proceedings to enforce these rate schedules or any other provision of the ordinances, for the serious condition outlined above was presented immediately upon the surrender and abandonment by the company of the franchise

grants and its putting into effect the increased rates. The company was advised that it was fully justified in taking this course and its immediate interests demanded that this should be done. It had done its best to secure relief from the City Council by continuous and persistent efforts to this end from February to August 20, 1918, without favorable result, or any prospect thereof. The only way that the situation could be adequately met was by the course which the company took, that is, the surrender and abandonment of the two franchises, the putting into effect of the increased rates and the filing of a bill in the Federal Court. All of the issues presented between the parties in the two cases, respectively, were properly before that court and it had full right and jurisdiction to hear and determine them. There is no merit in the suggestion that upon the main issues involved the city should have been the plaintiff and the company the defendant; nor, in the further suggestion, that the company, having broken its contract, has no standing as complainant in equity.

III

NATURE OF THE OBLIGATIONS IMPOSED UPON THE RAILWAY COMPANY BY THE TWO FRANCHISE ORDINANCES

The appellees contend that the ordinances, being franchise grants, are contracts and that the company is obligated by their terms to operate its cars at the prescribed rates for the remainder of the period therein named, to wit, twenty-five years. As the franchise grants were issued in the year 1901 they would expire by limitation in 1926. The appellants do not deny that the franchise grants were contracts controlling the rates of fare so long as they continued in existence, nor that the company, so long as it retained the franchises, was bound by these rates. The issue between the parties is whether the grants imposed any obligation upon the company to continue to exercise the rights and

privileges granted and to charge the prescribed rates for the remainder of the term named in the grants.

The legislation, in pursuance of which the city acted in granting these franchises, was incorporated in Sections 2501, 2502, 2504, 2505, 2505-b, 3443 and 3443-12, Bates Annotated Statutes of Ohio, Revisions of 1897 and 1902. These sections are copied in full in the margin of the case of *Cleveland vs. Cleveland City Railway Co.*, 194 U. S. 531. The most important section for consideration here is section 2501, which provides that no corporation shall construct a street railway until application for leave is made to the city council,

> "and the council by ordinance shall have granted permission and prescribed the terms and conditions upon and the manner in which the road shall be constructed and operated, and the streets and alleys which shall be used and occupied therefor, but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest."

Section 2502 provides that no grant shall be made except to the corporation "that will agree to carry passengers upon such proposed railroad at the lowest rate of fare."

Section 3443 provides that the "council or the commissioners, as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, operated, extended and consolidated."

The other sections and the other parts of the sections mentioned are not important for the purposes of the present case.

Turning now to the ordinances which are attached as Exhibits Nos. 1 and 2 to the bill and also to the amended bill in case No. 715 and to the bill in case No. 739, it is noted that the grant to The Columbus Railway Company, Exhibit No. 1, is a renewal grant. Before this grant issued the grantee owned and operated its lines of railway in the city under certain older franchise grants, which expired at

various dates, including certain perpetual franchises, and this particular franchise, known as the "Blanket Franchise," was granted and accepted in order that these franchises might be consolidated into one and all expire at the same date (excepting only the perpetual franchises, all rights under which were reserved under Section 20) and also to provide that the terms and conditions of the several grants should be made consistent. It will be noted that Section 2501, from which we have quoted above, provides that the city council shall prescribe the "terms and conditions" for the construction and operation of a street railway, but that if the grant is a renewal grant it may be renewed upon such "conditions" as may be considered conducive to the public interest. The phrase "terms and conditions" is used in the first instance and the word "conditions" in the second. They probably mean the same thing, although this language supports the suggestion that a renewal franchise grant is a grant upon condition. This is the view taken by the Supreme Court of New Jersey in *Collingswood Sewerage Company vs. Borough of Collingswood*, 102 Atl. 901, in which the third paragraph of the syllabus reads as follows:

> "An ordinance granting consent of a municipality to the incorporation of a sewerage company under the Act of 1898 and fixing maximum and minimum rates is a grant upon condition rather than a contract."

The important point to be noticed about these franchise ordinances is that the grants are strictly permissive. Section 1 of Ordinance Exhibit No. 1 provides that the franchises rights and privileges

> "be and the same are hereby renewed to said the Columbus Railway Company, its successors and assigns, for and during the term of twenty-five years from and after the passage of this ordinance; and the said the Columbus Railway Company is, and its successors and assigns are, hereby granted the franchise

and right, and are hereby authorized and empowered to maintain and operate its lines of street railroad upon and over each and all of said streets and avenues," etc.

In the rate schedule, Section 21, the grant provides that the company "shall be entitled to charge fares," etc. There is nothing in the ordinance indicating that the company *agrees* to do anything. By its acceptance of the ordinance the grantee bound itself to comply with the terms and conditions so long as it exercised the rights and privileges granted. The only place where the term of twenty-five years is mentioned is in that part of Section 1 quoted above, which provides that the former franchises are renewed "for and during the term of twenty-five years," and that the company is granted the franchise and right "for said term of twenty-five years." This does not evidence an agreement by the company. It expresses the limit of time beyond which the franchise shall not last. The acceptance of this grant appears in the Record of No. 739, page 50. The Columbus Railway Company, grantee in ordinance Exhibit No. 1, accepted "each and all of the terms, provisions and requirements of the ordinance," describing the ordinance as the one renewing to The Columbus Railway Company for a term of twenty-five years its grants, rights, privileges and franchises. The same acceptance of the terms, provisions and requirements appears twice at subsequent points in the acceptance.

In the absence of any express agreement on the part of the Columbus Railway Company, grantee, to continue to exercise the rights and privileges granted, the grantee did not make any such agreement or contract unless it can be implied from the acceptance of the grant.

The ordinance, Exhibit No. 2, is not so elaborate as No. 1. It grants the permission of the city to the grantee to construct and operate and recites that notice was given and bids advertised for and received and that the Central

Market Company bid and agreed to carry passengers upon the proposed road at the lowest rate of fare. It is important to note that the grant also is permissive. Section 1 provides that The Central Market Street Railway Company

> "be and is hereby granted permission and authorized to construct, operate and maintain a street railway in and upon the following streets in the City of Columbus, Ohio, to-wit."

Section 15 contains a rate schedule and provides that the company "shall be entitled to charge fares as follows." This franchise grant, like the other one, is permissive and there is nothing in it which indicates an agreement on the part of the company to continue to exercise the privileges granted for the term of twenty-five years therein named. The acceptance of the grant appears at page 51 of the Record in No. 739. There appears to have been a formal acceptance addressed by the President of the Company to the Board of Public Works and City Council, under date January 22, 1901, which states that the company "hereby accepts the terms and conditions of the ordinance," etc., and also a resolution of the Board of Directors adopted the same day by which the Board accepted "the terms and conditions of said ordinance." The term of twenty-five years is not mentioned either in the acceptance addressed to the Board of Public Works and City Council nor in the resolution. In the absence of any express agreement in the ordinance or its acceptance to continue to exercise the franchises and privileges granted for the term of twenty-five years therein named, if the company entered into any such contract or agreement it must be implied from the acceptance of the grant of the franchise.

Franchise grants of this kind have been the subject of consideration by this court in a great many cases. The case that naturally should receive the first consideration is *Cleveland vs. Cleveland City Railway Company*, 194 U. S. 517, 48 L. E. 1102, because in that case the court

considered certain franchise grants made by the City of Cleveland acting under the same statutory authority. In that case the Railway Company claimed protection under the contract impairment clause of the Federal Constitution against an attempted reduction by city ordinance of the rate schedule prescribed in a prior ordinance under which the said company was operating. The issue was whether the rate schedule in the prior ordinance was a contract and particularly whether the city had the power to enter into such contract. The court said (p. 534) that the statutes lodged in the city

> "comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated"

and, further (p. 535),

> "We can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing rates of fare which might be thereafter charged,"

also (p. 538),

> "Concluding, as we do, that the ordinance of 1898 impaired the obligations of contracts entered into by the City of Cleveland fixing the rate of fare to be charged on the lines of railroad operated by the complainant, the decree of the Circuit Court * * * is therefore affirmed."

The court also said (p. 534)

> "that in passing ordinances based upon the grant of power referred to, the municipal council of Cleveland was exercising a portion of the authority of the state as an agency of the state cannot in reason be disputed."

This Cleveland case has been referred to a number of times by counsel for the appellees, also by Judge WESTENHAVER in his opinion in No. 715, and by Judge HOLLISTER in his opinion in No. 739. On this account we have spoken of the case in detail, although we do not think that it is of any particular importance in connection with the real issues involved in the present case. Judge WESTENHAVER says (Record, No. 715, p. 80):

> "The primary and controlling question, in my opinion, depends on the nature of the relation created between the complainant and the city by these franchise grants. This relation is settled beyond controversy by numerous decisions of the Supreme Court of Ohio and of the Supreme Court of the United States."

He then refers to Section 2501 and the other sections referred to above, and cites certain Ohio cases and certain cases decided by this court, stating that the holding in these cases is uniform, and refers particularly to this Cleveland case in 194 U. S. 517. On page 81 he quotes a paragraph from the Cleveland case. The opinion proceeds on page 82 as follows:

> "No question is made but that the franchise grants now being considered did by their terms purport to create a binding contract as to the rate of fare for a term of twenty-five years. It follows from this settled law that a contract has been engendered, mutually binding upon the city and upon the owner of these franchises; that this contract requires the owner during the entire term of twenty-five years to furnish street railway service at the rates of fare therein provided, and that neither the complainant nor the city during this term has the right to change or alter that rate without the consent of the other. * * * It is equally the duty of the courts to uphold these contracts and vindicate the law when it is the grantee

> therein, and not the city which is seeking to change the terms thereof without the consent of the other party."

There is nothing in the Cleveland case nor in any of the other cases cited by Judge WESTENHAVER which sustains his conclusion that the franchise contract requires the grantee or its successors "during the entire term of twenty-five years to furnish street railway service at the rates of fare therein provided." This conclusion results from his erroneous construction of the franchise ordinances, for neither ordinance contains any covenant, express or implied, to furnish street railway service either during the entire term or for any period. An examination of the cases cited by Judge WESTENHAVER shows very clearly that no one of them supports his conclusion in this point.

Judge HOLLISTER also seems to think that the Cleveland case in 194 U. S. 517, settles this issue. In his opinion (Record No. 739, page 55) he considers the suggested difference between agreed rates and prescribed rates and quotes the following from the opinion in the Cleveland case:

> "We can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged."

We are quite in accord with everything decided in the Cleveland case, but we deny that it is authority for the conclusion that the grantee in a franchise grant, in the absence of express words imposing such an obligation upon the grantee, is bound to continue to operate under the grant for the period therein named when the rates of fare therein prescribed have become confiscatory.

Although these franchise grants are properly designated contracts, accurately speaking they are legislative enactments. They are laws of the city enacted in pursuance of authority delegated to the city by the State. This is recognized in the Cleveland case, as shown by the

last of the quotations above from said case. We doubt whether counsel for the city will deny that these franchise grants are legislative enactments, for this point has become well settled by numerous decisions in this Court.

Wright vs. Nagle, 101 U. S. 791, 25 L. E. 921;

Hamilton Gas Light & Coke Co. vs. City of Hamilton (an Ohio case), 146 U. S. 258, 36 L. E. 963;

City Railway Co. vs. Citizens Street R. Co., 166 U. S. 557, 41 L. E. 1114;

Penn Mutual Life Insurance Co. vs. Austin, 168 U. S. 685, 42 L. E. 626;

Walla Walla vs. Walla Walla Water Co., 172 U. S. 1, 43 L. E. 341;

St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 142, 45 L. E. 788;

Home T. & T. Co. vs. Los Angeles, 211 U. S. 265, 53 L. E. 176;

Grand Trunk W. R. Co. vs. South Bend, 227 U. S. 544, 57 L. E. 633;

Owensboro vs. Cumberland T. & T. Co., 230 U. S. 58, 57 L. E. 1389;

The Ohio cases are to the same effect:

State ex rel. vs. Cincinnati G. L. & C. Co., 18 Ohio St. 262, 292;

Hamilton G. C. & Tr. Co. vs. Hamilton & L. Tr. Co., 69 O. S. 402.

In most of these cases the railway company or other public utility appealed for protection under the contract impairment clause of the Federal Constitution against an attempted impairment of its contract. There have been, of course, a great many other cases of this kind in this Court

where the protection of the contract impairment clause has been claimed. Among these cases may be mentioned:

Freeport Water Co. vs. Freeport, 180 U. S. 587, 45 L. E. 769;

Detroit vs. Detroit Citizens Street R. Co., 184 U. S. 368, 46 L. E. 492;

Minneapolis vs. Minneapolis Street R. Co., 215 U. S. 417, 54 L. E. 259;

Milwaukee Electric R. & L. Co. vs. Railroad Commission, 238 U. S. 174, 59 L. E. 1254;

Detroit United Railway vs. Michigan, 242 U. S. 238, 61 L. E. 268;

Puget Sound T. L. & P. Co. vs. Reynolds, 244 U. S. 574, 61 L. E. 1325.

Sometimes the attempted impairment has been by subsequent ordinance of the City Council and sometimes by order of a Public Utility Commission created by the State for the purpose of regulating rates. These cases have no direct bearing upon the issues presented in the present cases. They settle the point that the right to regulate rates is a governmental function vested in the Legislature very analogous to the police power. The Legislature has the right to authorize municipalities to enter into term contracts with public utilities prescribing rates, but the rates prescribed in any such contract will not bar the State or prevent it from subsequent rate regulation unless the State has expressly authorized the municipality to make such contracts with respect to rates.

It is quite clear under these authorities that the City of Columbus was not authorized by the State of Ohio to bind the state by any rate schedule that it might insert in a franchise grant. Counsel for the appellees in the present cases contend that the company should be bound by the rate schedules prescribed in the two franchise grants because the city is bound, arguing that if the rates had turned out to be

too high instead of too low, the city could not have changed them. Although the city was bound, the state was not and could vest the Public Utility Commission with authority to regulate the rates prescribed in municipal franchise grants, and that Commission acting under that authority could direct the company to lower its rates, if they should be too high, so that in this way the public could be given full protection. The absence of such legislation shows that no such emergency has arisen.

The contract impairment cases, where the alleged impairment is by city ordinance, are interesting from another standpoint. They necessarily hold that such city ordinances are subsequent acts of legislation. These cases are, therefore, authority, if further authority is required, to sustain the position that the ordinances in the present cases are legislative enactments.

While these franchise grants, although accurately speaking legislative enactments, may properly be called contracts, limited however as hereinbefore stated, appellants do not at all concur in the conclusion reached by Judges WESTENHAVER and HOLLISTER that this ends the controversy. The contracts must be interpreted. The real issue here is whether they obligate the grantees and their successors to continue operations under them at the prescribed rates for the full term of twenty-five years, or whether that period is anything more than the term designated by the city beyond which the franchises may not be be exercised. Attention has already been called to the language of these franchise grants. There is no covenant or agreement expressed or implied, and nothing in them that looks like an agreement on the part of the grantee to continue operations under them for the term named. If they evidence any such agreement it must be implied on the theory that the city offered the franchises upon the terms and conditions named and for the period named, and that the grants were accepted. Such an acceptance is more consistent with an understanding that the privileges granted

may be surrendered at any time than with the theory that by accepting them the grantee assumed a binding obligation to continue operations under them for the term named. If it had been the intention of the city to bind the grantee to continue to serve the public by the exercise of the privileges granted for the term prescribed, it would have been very easy for the city to have inserted in these grants appropriate language to that effect. The absence of any such language shows, we submit, that there was no such intention. The character and importance of a covenant or agreement to operate for the full term, if there were any intention to that effect, is such as to preclude the possibility of its having been either overlooked or inadequately stated in the franchises; for such a covenant or agreement is the most important and far-reaching provision that could have been embodied in the ordinances. Such covenants or agreements are sometimes contained in franchise grants. They are not contained in the franchises under consideration. The inference is obvious.

There is no basis for implying any such agreement from anything that appears in the franchise grants or in the acceptance of either. Obligations are not raised by implication unless there is something in the written instrument showing an intention to impose such an obligation. These franchise grants and their acceptances are far more consistent with the contention of the appellants that they were permissive and could be surrendered at any time, particularly if there was any adequate reason.

In 15 *A. & E. Enc. of Law, 2nd Ed.*, under the heading "Implied or Quasi Contracts," page 1078, the author, in speaking of implied agreements, says:

> "The implication, of course, must be a reasonable deduction from all the circumstances and relations of the parties."

In 13 *Corpus Juris*, under the heading "Contracts," page 559; the author says:

> "In order that an unexpressed term may be implied the implication must arise from the language employed in the instrument or be indispensable to effectuate the intention of the parties. * * * A term which the parties have not expressed is not to be implied merely because the court thinks it is a reasonable term."

In *Caverly-Gould Company vs. Springfield*, 83 Vt. 396; 76 Atl. 39, the court was called upon to construe the vote of a town exempting from taxation all manufacturing establishments investing over $5,000, "established and put in operation in the town during the then succeeding twelve months." It held that a party who accepted such a vote and complied with its requirements

> "did not forfeit its right to exemption by ceasing to do business and leasing its real estate to another corporation, which was organized and conducting a different business long before the vote was passed, and not itself entitled to exemption."

The fifth point in the syllabus reads as follows:

> "The court may not, by implication, put into a written instrument what the parties have left out of it, though by mistake, nor reject what they have put into it, unless repugnant to some other part."

The court said (p. 42):

> "Following these rules as we must, it is obvious that we cannot read into this vote what we are asked to, for there seems to be no reasonable doubt about its meaning. Its language is neither obscure, imperfect nor ambiguous, but is plain, complete and explicit, and was evidently chosen with care and consideration, so

> it is not fairly open to construction and we see no warrant for saying that the town left, or intended to leave, anything to implication, but think that it expressed, and intended to express, all it wanted to ask of those who accepted its offer, and that the orator had a right to understand it so."

The defendant still owned the factory although it was leased to another and his defense, stated above, to a claim for taxes was sustained. The court denied the claim of plaintiff that an implied agreement must be read into the vote to the effect that a party could not escape the tax unless he not only constructed his factory but continued to operate it for the term named.

The Court in the last cited case, relied in part upon the decision of this Court in *Del. & Hudson Canal Co. vs. Penna. Coal Co.*, 8 Wall., 276, in which Mr. Justice CLIFFORD, delivering the opinion of the Court, said:

> "Undoubtedly, necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect."

And again said:

> "Examined in the light of the rules here suggested, the court is of the opinion that the articles of agreement set forth in the declaration contain no such covenants as those alleged by the plaintiffs as the foundation of their claim; that the terms of the agreement do not support the allegation that the defendants ever made any such covenants, nor that they ever agreed to pay toll except for coal actually transported under the agreement."

If these franchise grants, instead of providing for a term of twenty-five years, had contained no time limitation, there would be even less, and, in fact, practically no basis for the raising of an agreement by implication to continue to operate under them. Such indeterminate franchise grants carry with them the idea that they may not last perpetually or for any definite term provided some adequate reason develops for terminating them, notwithstanding the fact that in the absence of such adequate reason they may be properly designated perpetual. Any such indeterminate grants may be terminated either by the municipality or by the street railway company for adequate cause. The fact that a term of twenty-five years is named in a franchise grant ought not to make any difference in the interpretation of the grant, in respect to any implied obligation resting upon the grantee or its successor to continue to operate thereunder. If there is any express agreement either in the grant or in its acceptance, the situation naturally is different. We are now dealing with implied agreements only. In considering whether an agreement of this kind should be implied, we must not overlook the effect that such an implied agreement would have. It would amount to an agreement which would, under existing circumstances, prevent the company from performing its public duties. The enforcement of such an agreement would lead to insolvency and in the event of insolvency the company would be unable to serve the public. The only way that the company could continue to serve the public with street railway facilities was to refuse to continue service under these franchise grants, that is, to do just what it in fact did on August 20, 1918, surrender and abandon them.

If the company undertook to retain the benefits of the franchises and to escape liability for its burdens, particularly the rate schedules, the city would be in a position to enforce the rates. The contracts would still continue in force and the company would be obligated to comply with their terms and conditions.

This was the case in *Interurban Railway & Terminal Co. vs. City of Cincinnati*, 93 Ohio St. 108, 112 N. E. 186. The railway company was operating under a franchise from a suburban municipality, which provided that, if that municipality should be annexed to Cincinnati, the rate of fare to the Cincinnati terminus should not exceed five cents. It was:

> "*Held.*—The acceptance of the grant by the company constituted a binding contract between the parties. As long as the company retains the franchise and operates its road thereunder its terms must control."

On appeal the railway company sought leave to amend its answer and alleged that this rate of fare was confiscatory, but the Court of Appeals refused leave to file the amended answer. It is hardly conceivable that this amendment would have assisted the railway company, for it did not undertake to surrender the franchise. On the contrary, it claimed the benefits of the franchise and refused to pay the price. At the end of the opinion the Court said (page 124):

> "The only thing the court can do is to enforce the contract as it finds it and to hold that as long as the company continues to operate under the franchise it must submit to the terms thereof."

There can be no escape from this conclusion.

This same Interurban Railway and Terminal Company thereafter filed its complaint with the Public Utilities Commission of Ohio asking that the Commission should enter into an investigation of its rates of fare then charged and praying for an increase. The Supreme Court of Ohio (*Interurban Railway & Terminal Company vs. Public Utilities Commission*, 98 Ohio State 447) held that the Commission had no jurisdiction to regulate such municipal fran-

chise rates. The first paragraph in the syllabus contains the following:

> "As long as the company retains the franchise and operates its road thereunder, its terms must control."

In *City of Columbus vs. Columbus Street Railway Company*, 45 Ohio, 98, the city enforced an obligation assumed by the company by acceptance of the franchise grant to pave a portion of the street. The following appears in the syllabus:

> "By constructing and operating its railway the company accepted the burdens with the privileges of the ordinance and thereby incurred the continued obligation to make, construct and keep in order and repair, *as long as it enjoyed these privileges*, the portion of the street between the rails of its track, including such new improvement thereof as the city might determine and direct."

The Italics are ours.

To the same effect is *Cincinnati & Springfield Railway Co. vs. Incorporated Village of Carthage*, 36 Ohio, 631.

These cases go no further than to hold that while the franchise contract continues and the company retains its benefits the company is under an obligation to comply with its terms and conditions. There can be no doubt that this is a sound statement of the law, but it has no bearing upon the question whether a street railway company, by the acceptance of a permissive franchise grant, assumes any obligation to continue to operate thereunder. This question was given very careful consideration in the case of *San Antonio Street Railway Co. vs. State*, 90 Texas 520, 39 S. W. 926. This was a suit instituted by the State of Texas *ex rel*, to compel the Railway Company by mandamus to continue to operate a portion of its lines under a city ordinance granting a franchise for the life of the company's charter. The

lower court granted the relief prayed for, but the Supreme Court reversed the judgment. The first paragaph of the syllabus reads as follows:

> "Permission being granted an incorporated company, by ordinance of a city, to construct and operate a line of street railway, its acceptance, by constructing the line, of such mere permission to do so, does not impose upon it such an undertaking to continue to operate the entire line so built as the State can enforce by mandamus."

In the course of the opinion, GAINES, *C. J.*, said (page 526):

> "The legislature, in creating a corporation, had the power to give it an option to do or not to do the acts which it is authorized to perform. On the other hand, it may impose upon the corporation, as the law of its creation, the obligation to exercise to their fullest extent the powers which are granted. In either case, the proposed corporation may accept or not; and in the latter, if they do accept, they may be compelled by mandamus to perform the duties so imposed. But to say that in granting a charter to do a public service there is no difference between making it lawful to do an act and imposing it as an obligation to perform it, is to say that, by reason of the public interest involved, language is to have a different construction and effect from what it would have in statutes in general, or in private contracts. * * * When, therefore, a corporation, whether *quasi* public or purely private, is granted the privilege of doing an act, and there are in its charter no express terms which make it obligatory to do the act, or other words from which by fair construction that intention can be gleaned, we do not see upon what sound principle the duty can be imposed. * * * The franchise in question was granted by the city council, and the claim is that it is by virtue

of that concession, and its acceptance by the company that the duty arose. But the ordinance (which is quoted above) merely grants 'the privilege' of constructing and maintaining street railways over the lines therein designated. No clearer words of mere permission could have been employed. Not only this, but there is in the ordinance neither sentence, phrase, nor word that indicates that it was the intention of the council to make it a condition of the acceptance of its grant that the company should be bound to construct and operate railways over the streets which were therein specified. * * * It is clear that the ordinance in this case neither by express terms nor by implication imposes the duty upon the company. If the duty to construct and maintain the line is to be established, it must be upon the assumption that every privilege granted by a legislative body in reference to matter of public interest imposes upon the grantee who accepts it, the duty to perform the acts he is allowed to perform. The assumption, in our opinion, is, as we have already intimated, not based upon sound reason, and is in opposition at least to the weight of authority. * * * If it is the will of the Legislature, or of a municipal body to whom the power to confer the privilege may have been granted, to impose upon the corporation the duty to construct and to continue to operate the work, instead of a mere permission to do so, it is not difficult so to provide by incorporating into the grant some language which evinces that intention."

This case was cited and approved in *State vs. Helena Power & Light Co.*, 22 Mont. 391, 56 Pac. 685, which was a suit for mandamus against the Power and Light Company to compel it to operate a portion of its line of street railway in the city of Helena. The State contended that the acceptance of the city franchise grants imposed an obligation up-

on the company to continue to operate thereunder and that that obligation could be enforced by mandamus. The Court said (page 394):

> "The ordinances of the city are barren of language expressing or implying the intention of the council to impose such duty. On the contrary, they merely grant the right and privilege of constructing, operating and maintaining railways in particular streets."

The San Antonio Street Railway case, *supra*, was then cited, a long quotation was copied from it, and the petition for mandamus was refused.

In *Savannah Canal Company vs. Shuman*, 91 Ga. 400, the Court discussed a similar franchise grant and used the following language (p. 402):

> "So long as the corporation retains its franchise it will not be allowed to urge as an excuse for failing to perform any duty required of it by its charter that the same would be unprofitable. * * * If the rights, privileges and franchises granted by the charter are, in connection with the corresponding duties thereby imposed, no longer desirable, the company should simply surrender the charter."

In *Fellowes vs. Los Angeles*, 151 Cal. 52, the question presented was whether a water company could be forced to continue to supply water. The Court said (page 64):

> "We do not mean to say that a corporation engaged in the distribution of water to public uses may not abandon its property and quit the business without being subject to mandatory proceedings to compel it to carry it on. It may find it impossible to go on. Its supply may become exhausted or be insufficient for paramount needs, and the rates fixed by law may

be too small to enable it to operate at a profit or without substantial loss; or it may conclude without reason which the law would consider sufficient that it will not continue."

In *York & N. M .R. Co. vs. Reg.*, 1 El. and Bl. 858, the suit was mandamus to compel the railway company to complete its line. The Court held that the suit could not be maintained, saying (page 865):

> "It seems to us therefore that these statutes do not cast upon the plaintiffs in error this duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the legislature which are permissive only; and that there is no reason in policy or otherwise why we should endeavor to pervert them from their natural meaning."

This case is cited with approval in *Northern Pacific R. Co. vs. Territory of Washington*, 142 U. S. 492, where this Court said:

> "But if the charter of a railroad corporation simply authorizes the corporation without requiring it to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or maintain its road to that point when it would not be remunerative. *York & N. M. R. Co. vs. Reg.*, 1 El. & Bl., 858; *Grand Western R. Co. vs. Reg.*, 1 El. & Bl., 875; *Commonwealth vs. Fitchburg R. Co.*, 12 Gray, 180; *State vs. So. Minnesota R. Co.*, 18 Minn. 40."

The difference between a duty imposed and a privilege granted is recognized in *Sherwood vs. A. & D. Ry. Co.*, 94 Va. 291; 26 S. E. 293.

These authorities sustain the proposition that a street railway company operating under a permissive charter and permissive municipal franchise grants may discontinue its

street railway operations and cannot be forced to continue them by mandamus or injunction.

In *Northern Pacific R. Co vs. Territory of Washington, supra*, a condition is suggested to the right of the company to surrender a permissive grant, that is, the right is admitted if performance would be unremunerative. If any such condition is necessary, it certainly exists in the present cases for the bill charges that the rates are confiscatory and this charge is admitted by the motion to dismiss.

For failure on the part of the company to comply with any of the terms and provisions of the franchise grants, the rights, powers, privileges and franchises thereby conferred may be forfeited by *quo warranto*. This is the natural remedy reserved to the public for any such failure on the part of the company. An attempt to enforce the terms and provisions prescribed in the franchise grants by mandamus or injunction presents a very different question. In the present case, the basis of the city's position is an alleged contract obligation. The further continuance of the contract, that is, the further exercise by the company of the rights and franchises granted, being subject to the will of the company as the grants were permissive only, and the rights and franchises as well as the contract itself having been terminated by the Company by its surrender and abandonment, the contract right upon which the appellees rely no longer exists.

The fact that the franchises are permissive only does not make them any the less legislative enactments, nor any the less contracts, limited and terminable as herein stated. So long as the franchises are retained, the contractual rights and liabilities continue, but when the contracts are terminated, all such rights and liabilities are terminated also.

We are not unmindful of the principle that a duty is supposed to be imposed upon a public utility, such as a railroad company and perhaps also a street railway company, to continue to serve the public. The franchises and privileges are conferred upon the public servant for the

primary purpose of serving the public, rather than to yield profit to the company.

In *Northern P. R. Co. vs. North Dakota ex rel, McCue,* 236 U. S. 588, 59 L. E. 735, the Court said, in speaking of the railroad company in that case (p. 595):

> "The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the state, within the limits of its jurisdiction, may enforce them. The state may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order, and convenience.
>
> "But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. * * * The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement."

In *Norfolk & Western R. Co. vs. Conley*, 236 U. S. 605, 59 L. E. 746, the Court said (p. 608), in speaking of the power of the public authorities over railroad companies, and referring to the case last above cited:

> "It was further held that despite this range of permissible action, the state has no arbitrary power over rates, that the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward."

There is undoubtedly a duty resting upon the public to see that a public utility is allowed to charge compensatory rates. In the case mentioned above, *Interurban Railway & Terminal Company vs. City of Cincinnati*, 93 Ohio St. 108, the Court said (p. 123):

> "In fact it may be said that it is the duty of the municipal and other authorities to provide sufficient compensation."

In *City and County of Denver vs. Denver Union Water Company*, 246 U. S. 178; 62 L. Ed. 305, Mr. Justice PITNEY, delivering the opinion, said:

> "In this situation there can be no question of the company's right to adequate compensation for the use of its property employed, and necessarily employed, in the public service."

If any public authority undertakes to force a public utility to comply with any *quasi* duty resting upon it to serve the public, it must see that the compensation provided is adequate and compensatory, not confiscatory.

In the present cases, counsel for the appellees apparently rely not only upon the obligations of the contracts evidenced by the francise grants, but, in addition, they contend that the company has no right to cease its operations under these

franchise grants because of the alleged duty imposed by law, independent of any contract or agreement evidenced by the franchise grants, or implied from the acceptance of these grants, to continue to furnish street railway facilities to the people for the full term therein specified. Counsel for the city have referred to a number of authorities which discuss this *quasi* duty resting upon a public servant. A number of the cases are discussed by Judge WESTENHAVER in his opinion (Record No. 715, pp. 82, 83). These are cases in which the question decided was whether a railroad company may be compelled by injunction or mandamus to continue to serve the public. In these cases the railroad company had abandoned, or was about to abandon, the operation of its line, or a part of its line on the ground that further operations would result in loss. The question presented in these cases is not one of rates, but inability to operate at a profit irrespective of any rates that the company might charge. The present cases present a very different situation. The Columbus Company has not abandoned and has not threatened to abandon any part of its street railway lines. It charges that it cannot operate these lines without loss, if the rate schedules prescribed in the franchise grants are complied with. It denies it is obligated to continue to limit its charges to these rate schedules. It claims that the franchise grants are permissive only and that they have been surrendered and abandoned. It is quite willing to furnish street railway facilities to the public. It is in fact doing so at the present time and has never ceased operating its street railway lines, nor has it any intention to cease such operations, unless it is limited to the charges set forth in the franchise rate schedules. If these rate schedules are enforced against it, the company will have no choice. Insolvency will surely result and make it impossible for the company to continue. Its purpose in surrendering and abandoning the franchise grants was solely to escape any obligation to continue the rate schedules therein prescribed. It could not escape these obligations so long

as it retained these franchises. The issue is therefore narrowed to a question of rates and on this question the position of the appellants on this branch of the case is that the rate schedules no longer exist since the franchise grants have been surrendered and abandoned. So long as the company is allowed to continue to operate its street railway cars upon the streets of the city, no objection can be made to the new rates on the ground that they are unreasonable. The city has the privilege of ousting the company from the streets, excepting only those on which it has perpetual franchises, for the situation is the same as it would be if the franchise grants had expired by lapse of time, or had been forfeited by appropriate action of the city authorities.

If the company is mistaken in regard to its right to surrender and abandon these franchise grants, it is relegated to its other propositions which are discussed at a later point in this brief, that is, the effect of the war emergency and of the 14th Amendment upon the rights of the parties. On the supposition that the franchise grants are still in force, certain cases of the class referred to by Judge WESTENHAVER in his opinion (Record No. 715, pp. 82, 83) may become important because they discuss the question whether a railroad company can be required to continue to serve the public when this cannot be done without loss. These cases will be referred to later when we discuss the force and effect of the 14th Amendment.

There is another class of cases in which efforts have been made by the public authorities to f rce railroad companies or other public utilities to continue their operations, when the result of such operations would be a loss to the company and these efforts have been unavailing, although the decisions have not been based upon the fact that the grants of rights have been permissive or because the public utility was protected by the 14th Amendment, but rather upon the basis that it was practically impossible to make the company perform. The following are certain Ohio cases of this class:

In *State ex rel. vs. The Black Diamond Co.*, 97 Ohio St. 11, JOHNSON, *J.*, said (p. 17):

> "We know of no way to compel the owner of a line of railroad, which in its proper operation does not produce sufficient revenue to afford proper compensation, to continue its operation. We think it obvious that there could be no such compulsion. Such a situation has been considered in many cases."

In *Henry vs. P. C. & St. L. Railway Co.*, 2 Ohio N. P. 118, the Court in considering whether a railroad company could be forced to operate, uses the following language (p. 143):

> "I think equity will grant specific relief under a contract when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; but that it will withhold such relief when it appears that, from circumstances connected with its inception, the enforcement of the contract would be unreasonably harsh and oppressive, or when it appears that the contract was fair and just when made, but from subsequent events its enforcement would be unreasonably harsh and oppressive."

This last sentence is very pertinent to the present cases for the rate schedules provided in the franchise grants were fair and just when made but subsequent events have made them unreasonably harsh and oppressive.

In *Mathews, City Solicitor vs. Southern Ohio Traction Co.*, 5 Ohio C. C. (N. S.) 179, suit was brought to compel the Traction Company to perform certain obligations assumed by its predecessors in certain franchise grants. The syllabus reads:

> 1. "A decree of specific performance will not be granted by a court of equity, where, in order to make the performance effective, continuous supervision

will be required over personal acts of faith and diligence, and an exercise of judgment in meeting and adjusting relations to new conditions as they arise.

2. "It follows, therefore, the specific performance is not the proper remedy to compel an interurban railway company, which is operating an electric road under a municipal grant, to announce names of street crossings, to keep tickets for sale on its cars, to limit the speed of its cars, or to run cars as often as public convenience and the business of the road will justify."

In *Coe vs. C. P. & I. R. Co.*, 10 Ohio St. 372, the Court used the following language (p. 381):

"If we are at liberty to suggest, on what the legislature very probably relied for the continued operation of the railroad once constructed, we should say it was the interest of its owners. If it can be operated profitably, the interest of those concerned will rarely, if ever, fail to keep it in operation, so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss; and certainly there is no mode provided by which it can be operated at the expense and risk of the state, the prudence of such a course could find few or no advocates."

In *Port Clinton R. R. Co. vs. Cleveland & Toledo R. R. Co.*, 13 Ohio St. 544, suit was brought to enforce operation of a railroad under a lease. The Court refused specific performance, saying (p. 556):

"Even if the contract was sufficiently specific, so that the party, when ordered to operate the railroad, would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solu-

tion, not once * * * but in instances innumerable, and for an indefinite time."

In *Maryland Telephone & Telegraph Co. vs. Charles Simons' Sons Co.*, 103 Md. 136, the Telephone Company was operating in the City of Baltimore under an ordinance granting it permission to construct and operate its telephone lines in consideration for furnishing service at the rates prescribed therein. Those rates furnished adequate compensation for the number of patrons originally served, about five hundred, and for the kind of service then furnished by what was known as the "trunking system;" but when the number of patrons increased to seventy-five hundred, which greatly increased the cost of serving each patron, and, after the development of the art had made it necessary to adopt and use a much more extensive system known as the "central energy system," the company increased its rates about 50 per cent. in order to meet the increased cost of installation and service. Thereupon certain of its patrons, claiming the right to continued service at the ordinance rates, brought suit to enjoin the company from refusing to serve at those rates. The court decided against the plaintiffs below. In his discussion of the disastrous consequences which would result from granting the relief sought, PAGE, *J.*, in the opinion (pp. 144, 145), used the following very interesting language:

> "This would mean only one thing, and that is that the appellant could not find it possible to continue the service, but would speedily pass into the hands of receivers. The counsel for the appellees, while not resisting this conclusion, attempts to meet it by arguing that the service could still be supplied by deducting the alleged deficiency from the interest on the bonds * * * All of the proceeds thereof, referring to bonds, besides other large sums, were devoted exclusively to that purpose, and the expenditure was rendered necessary to furnish the equipment necessary to meet the

demand of the public. The bonds were put on the market and sold to purchasers * * *. So that the proposition asked for by the complainants is that the court shall issue its injunction restraining the appellant from charging more than the rates provided for by its contract as expressed in the ordinance, by which great losses will be incurred by many innocent persons, and the public will be deprived of the benefits of competition in the business of furnishing telephone service, for the benefit of and on the application of eighteen persons. By granting this injunction, each of the appellees will be nominally benefited in small amount; but in fact the appellant may be forced into the hands of receivers, so that the service cannot be rendered at all, and the decree would eventually be of no service to them, while disaster would be brought on the corporation, and large and irreparable losses entailed upon the holders of the bonds, and thereby the very purposes for which the ordinance No. 110 was enacted probably entirely defeated. Under these circumstances, it is manifestly the duty of the court to deny the injunctions prayed for, and leave the appellees to such remedies as they may have at law."

This list of cases might be multiplied almost indefinitely. Although the present cases are not suits for specific performance or for mandamus, the rights of the parties are properly before this court and these cases are important in considering what these rights are. It is inconceivable that the city could succeed in forcing the company to continue operating under the confiscatory rates in a suit for specific performance or in a mandamus proceeding.

IV

THE EFFECT OF THE WAR UPON THE OBLIGATIONS IMPOSED BY THE FRANCHISE GRANTS

In considering this branch of the case we assume for the purpose of the argument that the franchise grants imposed obligations upon the company to continue to operate its street railway lines during the balance of the twenty-five year term and charge only the rates of fare therein prescribed. Upon this assumption it does not at all follow that these obligations have continued until the present time or, in fact, were in force on August 20, 1918, when the company surrendered and canceled the grants. The war intervened and created a situation which was not within the contemplation of the parties when the grants issued and were accepted. The war has created a situation which has proved quite distressing to the street railway companies throughout the country, excepting only where relief has been granted by the local authorities. All operating expenses have advanced by leaps and bounds with the result that former rate schedules soon became unjust, unreasonable and confiscatory. This fact has been recognized in a great many localities and certain local authorities have acceded to requests presented by street railway companies to allow them to increase their rates. Although the City Council of the City of Columbus has been requested to allow the Columbus Company to increase its rates and negotiations have continued ever since last February to secure some relief for the company from the confiscatory rates prescribed in the franchise grants, no relief has as yet been given. It was because of this failure to secure any relief that the company undertook to surrender and abandon its franchises on August 20, 1918. Although relief has been granted to street railway companies at many points, such action does not, of course, evidence any legal right on the part of the railway company to demand such relief, but only evidences

a recognition of the substantial justice of the requests presented by the companies. The basis for the claim of the appellants in these cases that the company is no longer obligated to continue charging the rates prescribed in the two franchise grants, assuming that the grants impose such obligation, is that the situation presented by the war was not within the expectation or contemplation of the parties when the contracts were made, and that as this situation has been created by the war, which is a *vis major*, the company is justified in claiming that the contracts were not intended to be binding in any such event.

The leading case on this subject in the United States is *North German Lloyd Company vs. Guaranty Trust Company*, 244 U. S. 12, sometimes referred to as the Kronprinzessin Cecilie case. The Guaranty Trust Company shipped a large amount of gold from New York to Plymouth, England, on the Kronprinzessin Cecilie just before the war broke out, under a contract of carriage with the North Germany Lloyd Company, the owner of the ship. When the ship reached a point in the Atlantic Ocean about one thousand miles from Plymouth, the master was advised by wireless from the owners of the vessel, wiring from Germany, that war had been declared against Russia, France and England and was directed to return to the United States. He turned his vessel around and brought it to Bar Harbor, Maine, and failed to deliver the gold to the consignee. The Trust Company sued for damages for breach of contract. The defendant claimed that it was justified in the course it took and could not be required to respond in damages. This court sustained this defence. Performance was not made impossible by the breaking out of war, for on this point the Trust Company showed that the information received by the master by wireless was not correct and that if he had continued his voyage the contract could have been performed, as the voyage would have ended before war was declared. This Court said (p. 24):

> "Business contracts must be construed with business sense as they naturally would be understood by intelligent men of affairs."

The master, in mid-ocean, was presented with a situation which called for the exercise of business judgment, discretion and intelligence. He acted as an intelligent man of affairs should act under such circumstances. This Court said (p. 22):

> "The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine vs. Jane*, Aleyn 26, 82 Eng. Reprint 897, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which if they had been dealt with, it cannot be believed that the contractee would have demanded or the contractor would have assumed."

It cannot be believed that the North German Lloyd Company would have assumed the risk of landing the gold at Plymouth for the compensation provided in the contract if that company had believed that war would be declared before the vessel reached that port. Nor can it be believed that the Guaranty Trust Company would have demanded such services from the North German Lloyd Company. The situation presented to the master of the vessel was not within the contemplation of the contracting parties when the contract was made, and in that situation, properly handled by the Master, no obligation could arise out of the contract for failure to perform.

The latest English case on this subject is *Metropolitan Water Board vs. Dick, Kerr and Co.*, 1918, Appeal Cases 119 (House of Lords, November 26, 1917). The parties had entered into a contract for the construction of extensive water works, which would require a period of from four to six years to complete. The work was started in

August, 1914, immediately after war was declared and continued until February, 1916, when the Director of Factory Construction in the Ministry of Munitions commandeered a part of the plant used by the contractor, and further progress of the work at that time became impossible. The Water Board instituted suit in May, 1916, claiming that the contract was still binding on the parties, although work was necessarily suspended until after the war. The issue presented was whether the contract should be considered as suspended only or as abrogated. The Court held that it was abrogated, reversing the decision of the lower court, which held that it was suspended only. In the lower court, BRAY, *J.*, held that the delay resulting from the action of the Director of Factory Construction was not so great as to render the completion of the contract physically impossible or commercially impracticable. In the House of Lords, Lord FINLAY said (pp. 125, 126):

> "This is not a case of a short and temporary stoppage, but of a prohibition in consequence of war, which has already been in force for the greater part of two years, and will, according to all appearances, last as long as the war itself."

And again (pp. 126,127):

> "The contract in the present case was for the completion and handing over of these works within six years from August 16, 1914. The effect of the prohibition may be that the works cannot be resumed until, at all events, the greater part of the six years has expired, and by that time all conditions as regards labor and materials may be absolutely different. This, in the words of ROWLATT, J., would be 'not to maintain the original contract, but to substitute a different contract for it.'"

Lord DUNEDIN said (p. 130):

> "On the whole matter I think that the action of the Government, which is forced on the contractor as a *vis major*, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted. I have already pointed out the effect as to the plant, and, the contract being a measure and value contract, the whole range of prices might be different. It would in my judgment amount, if resumed, to a new contract; and as the respondents are only bound to carry out the old contract and cannot do so owing to supervenient legislation, they are entitled to succeed in their defence to this action."

Lord PARMOOR said (p. 130):

> "The question is one of contract law, and the decision in each case depends on the ascertainment of the true meaning of the bargain between the parties. If the parties have provided by apt words in the contract for their mutual rights or liabilities, in the event of the contract works being stopped, or indefinitely hindered by the operation of a subsequent law and such provision is not contrary to public policy, then it would be the duty of any Court to give effect to such provision. If, on the other hand, the contract contains no provision for such a contingency as the interference of the Legislature, then the Court must determine whether this contingency is of such a character that it can reasonably be implied to have been in the contemplation of the parties at the date when the contract was made."

And again (pp. 138-139):

> "What is the real meaning and purport of such a contract? It is that works shall be carried out at

prices fixed with reference to the then outlook for cost of labor, plant, and material, spread over a defined limit of time, which could not fail to affect materially the figures inserted by any contractor in sending in his tender. The same considerations would affect the appellants in coming to a determination whether a tender should or should not be accepted. During the execution of such a contract a contingency arises by the intervention of the Legislature, or of a department authorized by the Legislature, which renders the further continuance of the execution of the works illegal for a substantial and indefinite time, and which causes the removal of a large portion of the plant employed to Government works or for Government purposes. I use the word 'indefinite' since there is no certainty of the time of the duration of the war of which judicial cognizance can be taken. Can it be said that a risk of this kind was in the contemplation of either party at the date of the contracts? The necessary implication appears to me to be that it is a risk which no contractor would contemplate to be a risk under his contract, and which no public body controlling public funds could have regarded as a possibility affecting their liability in the absence of express provision. It is not necessary to say that the works are not physically possible, or could not practically be carried out as a business adventure, at a subsequent date. I agree that the probability of hardship to one side or the other is not a matter of material consideration, but it is quite a different matter when there is an indefinite and indeterminate liability which might impose on either party an unforeseen burden totally foreign to the ordinary incidents in a contract of this character, or which might not improbably eventuate in a loss to both parties without any compensating advantage. In my opinion the original contracts have ceased to be operative."

And again, pp. 140-141, after stating that a contracting party may bind himself against any contingency by appropriate words, Lord PARMOOR quoted with approval from the opinion of HANNEN in the case of *Baily vs. DeCrespigny,* 4 L. R., Q. B., 485, as follows:

> "But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

This Water Board case was considered by Judge WESTENHAVER, who said (Record, No. 715, p. 84):

> "In Metropolitan Water Board vs. Dick, Kerr & Company a contractor had agreed to construct a part of a water system within six years, and after beginning work thereon his equipment and the site upon which he was to do the construction work was seized by the military authorities of Great Britain for war purposes. Obviously here was a *vis major* rendering impossible the further performance of the contract into which the parties had entered. It was impossible to proceed further."

Judge HOLLISTER, in speaking of this Metropolitan Water Board case, said (Record No. 739, p. 59):

> "The English Government commandeered the plant of the contractor to build water works, making it impossible for him to proceed with his contract."

Both of these judges apparently thought that performance by the contractor was excused, because performance had become impossible, owing to the fact that the contractor's plant, or a part of it, had been commandeered by the

authorities. This is not the point decided in this Metropolitan Water Board case. Both parties in that case admitted that performance had become impossible by action of the authorities, until after the war was over. The Water Board contended that the contractor was still liable under the contract to perform at the end of the war. The contractor contended that at the end of the war the situation would be so different in regard to performance of any contract of this kind, that he should be relieved from all liability to perform. The court took this view. The case is direct authority in support of the appellants' contention in the present two cases, because it sustains the view that a situation, which was not within the contemplation of the parties at the time the contract was entered into and which was brought about by the war, is not within the scope of the contract and no liability arises for failure to perform. The only difference between the Water Board case and the instant cases is that in the Water Board case the question was whether the contractor should be held liable to perform his contract at the end of the war, whereas in the instant cases the question is whether the Railway Company is obliged to perform its contract at the present time. In both cases the unexpected situation was brought about by the war and, of course, in both cases the situation that has developed could not have been within the contemplation of the parties at the time the contract was made.

In *Liston vs. Owners of Steamship Carpathian* (1915) 2 K. B. (E. & J.) 42; 84 L. J. K. B. 1135; 112 L. T. N. S. 994, seamen shipped for a voyage for specified wages, but upon arrival at an intermediate port found that war had broken out and on that account that the risks of the voyage had very materially increased. They refused to proceed, but upon being promised higher wages agreed to continue the voyage. When the voyage was over, the master refused to pay the extra wages. The seamen sued and in the opinion of Lord COLERIDGE said p. 47:

"It is quite clear that seamen who enter into a contract of service as seamen cannot, because they do not like the conditions of their service, or there happens to be a storm, or because, under certain circumstances they are asked to do a little more or heavier work in consequence of illness of the crew, or for some other reason of a similar nature, demand to be released from that contract; for that is the result if they are entitled to require increased remuneration. They undertake by their contract to give their whole time, and they also undertake certain risks of navigation which are well known to all of them; and all those risks are in contemplation between the parties when the wages are fixed. But it is quite clear that it was not in the contemplation of the parties when they made this bargain that war would be declared between the country of the ship and another power, both being maritime powers and both having vessels of war which might or might not overrun the very portion of the sea through which this vessel was to pass. * * * *Prima facie* a war risk is not necessarily a risk to life. A risk to life has in certain circumstances, which it is not necessary to enter into, been held to be a ground for the discharge of the contract. But that is not the guiding point of my judgment in this case. The test is whether there were war risks which in the reasonable contemplation of the parties might involve capture at sea. In embarking on a vessel upon a commercial voyage one does not include among the risks of the voyage capture by an enemy. What were the risks which reasonably a seaman might contemplate in the present case?"

The court then considered the ordinary risks and held that these war risks were extraordinary risks not within the contemplation of the parties when the contract was made and concluded as follows:

"In these circumstances I am of opinion that the crew were justified in remaining on shore at Texas and refusing to proceed on the voyage and that being so that they were discharged from their obligation to sail."

In the case of *Tamplin Steamship Co. vs. Anglo-Mexican Petroleum Products Co.*, Appeal Cases, 1916, Vol. 2, p. 397, where a similar question was presented, LORD HALDANE said (p. 407):

"The question must always turn mainly on the facts. But if the facts be such that it appears that the power of performance has been wholly swept away to such an extent that there is no longer in view a definite prospect of this power being restored, then the contract must be looked upon as being wholly dissolved, and the courts cannot take any course which would in reality impose new and different terms on the parties."

In *Brenner vs. Consumers Metal Co.*, 41 Ont. L. R. 534 (1917-1918) plaintiff sought to recover damages for the non-delivery of five carloads of shrapnel turnings according to contract. The defendant argued that it had made an honest effort to comply with the contract but failed because of lack of shipping facilities. The Court approved the ruling of the trial judge in the following language (p. 538):

"That it was an implied term of the contract that unless the necessary shipping facilities should be available within a reasonable time the obligation of the company to deliver should be at an end."

In *Krell vs. Henry* (1903) 2 K. B. 740, suit was brought for the rent of a flat which was hired for the coronation parade at the coronation of King Edward VII. The celebration was postponed and the defendant denied liability on the ground that he had hired the flat to see the

parade and there was no parade. WILLIAMS, *L. J.*, delivering the opinion said (p. 749):

> "I do not think that the principle of the civil law, as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of something which is the subject matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things."

The court sustained this defence on the theory that the defendant never intended to pay for the flat unless he and his party could see the parade.

In *Chicago M. & St. P. Railway Co. vs. Hoyt*, 149 U. S. 1, the defendant railway company had leased to the plaintiffs a plat of ground to be used, with other ground owned by them, for grain elevator purposes and the contract sued upon contained a covenant on the part of the railway company that the amount of grain *received* at the elevator should be at least 5,000,000 bushels on an average for each year for the term of the lease. It developed that certain parties using the facilities of the grain elevator allowed their grain to remain there, so that the elevator company could not handle the 5,000,000 bushels for which the contract provided. The result was a loss to the elevator company and it sued the railroad company for damages. The opinion in that case said that a party may contract by an unqualified undertaking to bind himself to anything which

subsequently becomes impossible, or to pay damages for non-performance and then the following language from the opinion in *Baily vs. DeCrespigny*, 4 L. R., Q. B. 485, and which also appears in the last quotation above from the Metropolitan Water Board case was used in the opinion (p. 15):

> "But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

The result was that the contract of the parties was given such an interpretation that the railway company was not held bound by it in the unexpected situation which had developed.

In *The Steamship Styria vs. Morgan*, 186 U. S. 1, the Master of the steamship Styria unloaded in Sicily some sulphur that had been shipped from Trieste to New York, because war had been declared and sulphur was contraband of war. The Court held that the master had exercised reasonable discretion in pursuing this course, and that the owner of the ship was not liable in an action for damages.

In *B. E. & C. R. Co. vs. N. Y., L. E. & W. Co.*, 123 N. Y. 316, the defendant railroad company had guaranteed the bonds of another railroad company which subsequently became insolvent and went into the hands of a receiver. The bondholders undertook to enforce the guarantee. The railway company, guarantor, defended on the ground that a situation had developed which was not within the contemplation of the parties when the guaranty was given and that on that account the guaranty could not be enforced. PECKHAM, *J.*, said (p. 328):

> "This is a condition of things not contemplated by either party at the time of the execution of the con-

tract. It is claimed that the insolvency of the plaintiff company was one of the facts which the contract provided for as the plaintiff company would be insolvent if it could not earn enough to pay its operating expenses and the interest mentioned, and that it was in just such case that the contract provided for an advance by the defendant to the plaintiff company."

And, again, on the same page, he said:

"The obligation to continue to pay the interest on the bonds of a company which could not earn enough to pay its own operating expenses is one which we cannot, in the light of the proved facts in this case, credit the plaintiff company with obtaining or charge the defendant with assuming. The consideration which the defendant would obtain by reason thereof is grossly insufficient to predicate the voluntary assumption by it of any such obligation. I think it may be properly assumed that the obligation to advance was founded upon belief that in the future it might be that the plaintiff company as with others owing to temporary embarrassments or the working of unforeseen though temporary causes, a contingency might arise by which a particular payment of interest could not be made because of an insufficiency of net earnings from which to pay it, and, in that event, the defendant was to advance enough to make up such deficiency, and this advance was to be secured by the pledge of future net earnings. It was clearly contemplated and supposed that there would be such earnings, although their existence was not a condition precedent to the right to claim repayment for such advances."

In *Moore & Tierney, Inc. vs. Roxport Knitting Co.*, 250 Fed. 278, the defendant company was unable to perform its contract with plaintiff to manufacture and deliver certain goods because the Advisory Board of National Defense

had called upon it to manufacture goods for war purposes. Plaintiff sued for damages for breach of contract but the Court held that:

> "It is the duty of a manufacturer where the United States orders war supplies to comply with the order though that prevents him from carrying out earlier contracts with private persons."

Such a situation was not within the contemplation of the parties to the contract.

Judges WESTENHAVER and HOLLISTER do not read these cases as we do. Judge WESTENHAVER (Record No. 715, p. 84) comments very briefly upon a number of them and then says (p. 84):

> "No such conditions are here present. The performance of these franchise contracts has not been made illegal nor rendered impossible by any superior power. War conditions, it is true, have made the performance of them only more burdensome and expensive, so far as the facts now presented tend to show. The war has in a different degree perhaps affected the performance of many, if not the larger part, of outstanding and unexecuted contracts between citizens of the United States, yet it would be a strong proposition to say that all such contracts are thereby rendered void or voidable at the option of the losing party.
>
> "The increased cost to complainant of performing its franchise contracts differs only in degree and quality from that due to other economic causes prevailing since they were made. If the war or economic changes had decreased the price of coal, materials, supplies and labor, it would not be urged upon anyone that the city would have the right to declare null and void these contracts or the fare provisions therein, and establish a new rate in accordance with new conditions; and if the city should take such a position it would be

met, and justly, with a complaint that such action is impairing the obligation of a valid and binding contract.

"In order to make applicable the principles of law urged in this connection, it would be necessary to show that war or military authority had directly interfered in such a manner as to make these contracts illegal or impossible of performance. Nothing less than the equivalent of actual seizure by military authority, or a direct and forcible intervention to prevent further performance, would bring the case within the operation of these rules."

Judge HOLLISTER comments more fully upon these cases (Record No. 739, pp. 55-59). On page 55, after stating that at the conclusion of the argument he had some doubt about whether or not this defence was not a valid one, he says:

> "That doubt lingers still. It must be conceded by defendants that when the contracts were made, the parties could not have had in mind the possibility that years thereafter such a catastrophe as this war would have befallen the world, and that the extraordinary rise in the cost of living, resulting therefrom, would have required an advance in the cost of labor so great as, if operation under the franchises were continued at the contract rate, to bankrupt the company; or that what was in effect a governmental compulsory war board of arbitration would fix a confiscatory wage for labor."

And again (p. 56), after stating plaintiff's argument, he says:

> "This argument carries counsel further than the circumstances of this case require, and if sound, would lead to the conclusion that any abnormal labor conditions of such a character as to bring about the bank-

ruptcy of the contractor by rendering compliance impossible would excuse him from performance and bring his contract to an end. This cannot be. A frequent illustration of abnormality in labor conditions is strikes, and their often disastrous financial consequences to the employer of labor. No one would now say that strikes and their results, however serious the financial consequences, bring to an end the contractor's obligation to perform his contract requiring the employment of labor. For still less cause could one affirm that if, upon adjustment of the controversy, the contractor agrees on a wage so high that it would bankrupt him within a short time, he could terminate his contract."

And again (p. 57), after speaking of the Seamen's case, which is the Steampship Carpathian case referred to above:

"If there is any analogy presented by the Seamen's Case, it lies in the fact that in that case the danger of capture during the voyage was not in the minds of the ship-owner or the seamen when the shipping articles were agreed to; while in this case the certainty of bankruptcy growing out of conditions affecting wages brought about by the same war, could not have been contemplated by either party."

This is a fair statement of plaintiff's contention. He continues:

"Logically, if the Seamen's Case is applicable to this, and should be adopted as the law of such a case as this (it was decided in February, 1915), the way would be open for the destruction of innumerable contracts to carry out which the employment of labor is necessary and which the parties expected, and agreed, to carry out, whatever the condition of the labor market might be during performance. In my judgment, the Seamen's Case does not apply to this (it is

> regrettable that the opinion of the court does not discuss the question involved in it from the standpoint of principle or previous decisions)."

And again (p. 59):

> "This is a different case. Here the government did not interfere directly with the contract, or appropriate in any way the complainants' plant to any of the government's purposes. The *vis major* apparent in those causes is wholly lacking here."

The present cases cannot be distinguished from the cases cited above simply on the ground that performance of the contract has become only more burdensome and expensive and that the war has affected the performance of many contracts, and that the increased cost differs only in degree from that due to other economic causes. Nor can these cases be distinguished from those cited above on the ground that increased costs are often due to strikes, as suggested by Judge HOLLISTER. Nor is it fair to say, as he does, that "the *vis major* is wholly lacking here." The difficulty in which the street railway company finds itself is directly due to the war and the war is properly designated a *vis major*.

It is not necessary to establish a *vis major* in order to bring the case within this class; for example, there was nothing of that kind in the case of *Krell vs. Henry, supra*, which was the Coronation Parade case, nor in the case of *Chicago, M. & St. P. Railway Company vs. Hoyt, supra*, which was the grain elevator case. Any case where a situation has developed which could not have been within the contemplation of the parties when the contract was entered into may be brought within the class if the necessary elements are present. In all of the cases of this class where a contracting party claims that the obligations of the contract do not apply because of the unexpected situation that has been presented, it must be shown that the situation is caused either by a *vis major* or by

something which was not and could not, in the ordinary course, have been contemplated and which has made a radical difference in the performance of the contract. Judge WESTENHAVER said (Record No. 715, p. 87):

> "It is undoubtedly true that the present situation is due to the rapid and unexpected evolution of uncontrollable events."

Judge HOLLISTER says in the first quotation above from his opinion that the parties could not have had in mind the possibility of any such catastrophe as this world war. Of course the war was not contemplated by the contracting parties. The present cases are therefore up to this point within the principle announced in the cases cited above. There is, however, another feature which must also be present in order that any particular case may be brought within this class of cases. The party claiming that the obligations of the contract do not apply in the unexpected contingency that has arisen, must show that the unexpected contingency has made a material difference in the performance of the contract and the difference must be such that no reasonable man, or any business man of intelligence, prudence and good judgment would have made such a contract if such a contingency had been contemplated. This point was carefully considered in the Kronprinzessin Cecilie case, and this Court held that it could not be believed that the contractee would have demanded or the contractor would have assumed the risks involved in the unexpected contingency that was presented, and that in that unexpected contingency the master of the ship had acted with intelligence and good judgment. The same point was considered in the Seamen's case and the Court held that the added risks of the voyage due to the war could not have been within the contemplation of the parties and that the seamen would not have shipped for the voyage at the stipulated wages, if these risks had been contemplated. On the other hand, if the balance of the voyage was to take place on seas where

there would be no chance of a German raider appearing, the seamen would not have been justified in refusing to perform their contracts. The same point was considered in the Styria case and this Court held that the sulphur would not have been received for transportation if the parties had contemplated that war would break out before the voyage was completed and, further, that the master had acted with intelligence and prudence in unloading the sulphur instead of transporting it to the consignee. In the Water Board case the Court held that, if the contractor was made to perform his contract after the termination of the war he would in fact be perfoming a different contract, as all of the conditions of performance would be different. This presents a very analogous situation to the situation presented in the present cases. If the railway company is required to perform the franchise contracts it will be forced to perform different contracts from these that its predecessors entered into by their acceptance of the franchise grants. The risks of performance are materially different from the risks contemplated, when these franchise grants were accepted. The same is not true where a contractor claims that he should not be forced to perform his contract because of strikes. A contingency resulting from strikes cannot be said to be outside of the contemplation of the contracting parties. Every contractor must necessarily contemplate that his employes may strike, particularly if he is required to employ a large number of men in order to perform his contract. The same is true if the suggested basis for relief is an economic change or economic changes. Such changes must be held to have been within the contemplation of the contracting parties when the contract was signed. The principles that must be applied in order to determine whether a particular case justifies relief are are reasonably clear, but, as is often the case, difficulties arise in applying these principles. In applying them to the present cases it must be recognized that the franchise contracts under existing conditions are different contracts from

the contracts which the parties intended to make, when the franchises were granted and were accepted. If the Columbus Company is, under existing conditions, required to perform these contracts, it will be required to perform different contracts from those which were originally made. This has resulted from no fault on the part of the Columbus Company. The cause is primarily traceable to the war, just as was true in the Kronprinzessin Cecilie case, the Water Board case, the Seamen's case, the Styria case, and a great many others. These cases recognize that war may have such a material and vital effect upon contract obligations that performance will not be enforced, if the party claiming relief can show that by reason of the war the contract which he or it is called upon to perform is a materially and vitally different contract from the one that was in the contemplation of the parties at the time the contract was signed. The present cases come within the class.

V

EFFECT OF THE FOURTEENTH AMENDMENT UPON THE RIGHTS OF THE PARTIES

If the franchise grants were in fact surrendered and ended, either because they were permissive in character or because of the war emergency, no issue is presented under the 14th Amendment, but the situation is the same as if the franchise grants had expired by lapse of time, or had been properly forfeited. A very similar case from Detroit involving the Detroit railway system was argued in this court on December 9, 1918, in which the Detroit Company undertook to set aside rates prescribed for the operation of its railway lines on streets where its franchises had expired. The difference between that Detroit case and the present cases is that the Detroit Company is undertaking to prevent the enforcement of a rate schedule, which it claims is confiscatory, on a portion of its lines, on which it admits that it has no franchises, whereas in the present cases

the appellants are endeavoring to prevent the enforcement of surrendered franchise grants with rate schedules which they claim are confiscatory. An analogous situation was presented in Toledo in the case of *Henry L. Doherty vs. The Toledo Railways & Light Company*, in the District Court of the United States for the Northern District of Ohio, Western Division, decided Aug. 2, 1918, where the railway franchises had expired. The District Court held that the city could not enforce rates prescribed by it which did not yield a fair return to the company. In the Detroit case the decision of the District Court was the other way. In the case of *Denver vs. Denver Water Company*, 246 U. S. 178, a very similar issue was decided by this court. These various cases do not quite reach the question involved in the present cases. They would be pertinent if the city of Columbus would accept the surrender and abandonment of the franchise grants and would then undertake to prescribe new rate schedules, against which the Columbus Company, if it thought them confiscatory, would be required either to claim the protection of the 14th Amendment against them, or to cease operating its lines. The Columbus Company has not as yet reached that situation. The issue presented in these cases, and particularly on this branch, is whether the appellees are authorized to enforce performance of the franchise grants, with their confiscatory rate schedules, and whether the company is not entitled to the protection of the 14th Amendment against such enforcement.

The rates prescribed in the two franchise grants are extremely low. The company cannot earn a fair return upon its investment if its charges are limited to these rates. If they were imposed upon the company by any city council, or commission or other body vested with authority to regulate rates and the company had theretofore been operating under a higher schedule, such prescribed rates would clearly be held confiscatory, and their enforcement would be enjoined as a violation of the 14th Amendment. The result would be the same if this hypothetical case were mod-

ified to the extent that the company, instead of claiming protection at once under the Fourteenth Amendment against these prescribed rates, operated under them for a period and then found that they were not producing sufficient revenue to yield a fair return upon the capital invested. This period of operation under such prescribed rates might be considered a period during which they were tested to see whether they were adequate and sufficient, or whether they were confiscatory, or it might be that, when originally prescribed they would be adequate but changed conditions, particularly increased operating expenses, might render them confiscatory. In either case the company could successfully claim the protection of the 14th Amendment.

There is no difference in principle between a rate confiscatory *ab initio* which has not been accepted and an accepted rate reasonable at the time, but which has become confiscatory and inadequate by reason of subsequent developments. A law may be constitutional when it is passed but, as the result of future developments, it may violate some constitutional limitation. This question was presented to the Supreme Court of Ohio in the case of *Castle vs. Mason*, 91 Ohio St. 296, 110 N. E. 464. The suit was instituted by a dealer in oils, gasoline, petroleum, etc., against the State officer whose duty it was to enforce a State inspection act requiring oils, gasoline, petroleum, etc., to be inspected, the purpose of the proceeding being to secure an injunction against the enforcement of the inspection act on the ground that it was unconstitutional. The basis for the relief claimed was that the fees prescribed by the inspection act had become, by reason of changed conditions, so large that they had no relation to the cost of inspection and on that account the act was not a proper exercise of the State's police power. The first point in the syllabus reads:

> "The constitutionality of a law may be determined by its operative effect though on its face it may be apparently valid."

The following appears in the opinion:

> "A law may be within the pale of constitutional authority when originally passed yet, because of its future operations, it may directly contravene the organic law."

A State legislature may enact a two-cents-a-mile law, which would be a reasonable rate regulation at the time it was enacted, but might become inadequate and on that account confiscatory by reason of subsequent developments. In that event any railroad company, otherwise subject to the provisions of the act, could claim protection under the 14th Amendment on the ground that the enforcement of the act would deprive it of its property without due process of law. If we apply these principles to the facts in the present cases, we may admit that the rate schedules in the franchise grants were reasonable and proper when these franchise ordinances were enacted and accepted, but the same rate schedules, by reason of subsequent developments, may become inadequate and confiscatory, which is in fact the case, and on that account the company should be entitled to the protection of the 14th Amendment against their enforcement.

This court has been called upon many times to consider whether prescribed rates were confiscatory. The principles of law involved are clear enough, but it is not always easy to apply them. The determination of the value of the investment presents many difficulties, also the amount of the earnings. Sometimes the company files its bill at once before the prescribed rates have been tested. In that event the court has to rely upon estimates. Sometimes the rates are tested for a period and in that event the court has actual figures from which to draw its conclusions. In *Norfolk & Western Railway Co. vs. Conley*, 236 U. S. 605, the Railway Company tested the rate, which was a rate of two cents a mile, fixed by act of the legislature of West Virginia, for a period of two years before filing its bill. The company established by its testimony that it could not earn a fair

return upon its passenger traffic by operating at this rate and on that account the court held that, so far as that company was concerned, the rate offended against the due process cause of the 14th Amendment. If the railroad company had waited for ten years and the proof had been the same, the result would have been the same.

The difference between the usual cases of this class and the present cases is that usually the rates objected to were prescribed in the exercise of the rate regulating power only, whereas in the present cases the rates represent terms or conditions in franchise grants. The two franchise grants are laws of the State, acting by ordinance of the city council, and the enforcement of the rates thereby prescribed will just as effectually deprive the company of its property without due process of law as in the class of cases mentioned. It is the result against which the 14th Amendment protects.

This result follows in the present cases none the less because the laws granted franchises which were accepted by the company; also none the less because the rates so prescribed are conditions of the grants. In the present cases the grantees accepted the grants subject to the condition that they would comply with the prescribed rates; but their successor does not undertake to retain the grants and at the same time, to repudiate the rate schedules. By the surrender and abandonment of the franchises the company places itself in a position where it can claim the protection of the 14th Amendment. Judge WESTENHAVER thought that this issue was settled against the contention of appellants by the conclusion that the grants were contracts. We believe that he considered them business or proprietary contracts rather than legislative enactments. If they were business or proprietary contracts the 14th Amendment would not apply, but it is clear that these grants are laws and not business or proprietary contracts, and, being laws, the 14th Amendment applies.

In *Interstate Consolidated Street Railway Co. vs. Commonwealth of Massachusetts*, 207 U. S. 79, which came to this court by writ of error to the Supreme Court of Massachusetts, a street railway company refused to comply with the requirements of a State statute, providing that school children should be carried at a reduced rate although that statute had been passed by the legislature before the street railway company was incorporated.

The syllabus reads as follows:

> "A street railway company whose charter subjects it to 'all the duties, liabilities and restrictions set forth in all general laws now or hereafter in force relating to street railway companies' is bound by the requirement of a statute previously enacted, that street railway companies shall transport school children at a reduced rate, although such statute may be unconstitutional as to already existing corporations."

Although the case was decided on the ground mentioned in the syllabus quoted above, the Court, speaking through Mr. Justice HOLMES, after discussing this point, said (p. 85):

> "Speaking for myself alone, I think that there are considerations on the other side from the foregoing argument that make it unsafe not to discuss the validity of the regulation apart from the supposition that the plaintiff in error had accepted it."

He then proceeded to consider whether this rate regulation was open to attack on the ground that it was unconstitutional because confiscatory. The rate regulation was sustained as an exercise of the police power, and also because the testimony did not clearly show that the rates were in fact confiscatory. Mr. Justice HARLAN held that the constitutionality of the act is necessarily involved, but he did not think (p. 88) that "upon any showing made by this

record" the rate regulation was unconstitutional as depriving the company of its property without due process of law.

This case is interesting because the rate regulation which was discussed was not a new rate regulation directing a company theretofore operating to charge a particular schedule of rates, but, on the contrary, was a statutory rate regulation on the statute books before the corporation was organized. The case is interesting from several points of view:

First.—The statute regulating the charge for school children was held to be an expression of legislative policy to the effect that school children should only pay one-half of the regular fare. The lower Court held that there might be a number of reasons which influenced the Legislature to enact a provision of this kind. This Court held that it was properly within the police power.

If the statute had prescribed specific rates, as, for example, five cents for adults and three cents for children, a different question would have been presented. The statute would not have been an expression of legislative policy to the effect that school children should be allowed to ride cheaper than others, but would have been a rate regulation to keep the rates down, and in the light of the opinion in the case the Court would probably have held that such rate regulation was unconstitutional and void because in violation of the 14th Amendment. A case of the kind suggested would be like one where a railroad corporation is organized under the laws of a state, which has theretofore enacted a two cents a mile statute. Such a company by accepting its charter in a sense accepts all of the pertinent legislation on the statute books at the time the charter issues, including the two cents a mile act, and yet it is hardly conceivable that if such two cents a mile statute should turn out to be confiscatory, such company would be barred from attacking the statute, because by the acceptance of its charter it had accepted this rate.

Second.—The general incorporation act of the State of Massachusetts under which this Company was organized contained an unusual express provision that the Company should be subject to all the duties, liabilities and restrictions of the general laws relating to street railway companies. This Court held that under this provision this statutory rate regulation was, for all practical purposes, written into the Company's charter. The Company could not keep the charter and escape liability to comply with the requirements of this rate regulation. In the present cases the objectionable rate schedules are written into the face of the franchise grants, but the Company has surrendered and abandoned those grants.

Third.—In this Massachusetts case the point set forth in the syllabus quoted above does not present any Federal question. The jurisdiction of this Court necessarily depended upon the application of the 14th Amendment. That question was sufficiently serious to justify the Court in maintaining jurisdiction. It does not appear that any question of jurisdiction was discussed in the case, but it necessarily follows that the jurisdiction of this Court must have depended upon the fact that this Federal question was presented.

We have spoken above, in that part of the brief (p. 41) in which we discuss the question whether the franchise grants were permissive only, of a class of cases to which Judge WESTENHAVER referred in his opinion (Record No. 715, pp. 82-3). These cases discuss particularly the question whether a railroad company is authorized to abandon a part or the whole of its line, if such part or the whole line cannot be operated profitably. Judge WESTENHAVER referred particularly to the case of *Southern R. Co. vs. Hatchett*, 174 Ky. 463, 192 S. W. 694, L. R. A. 1917-D, 1105. The second point in the syllabus shows the difference between that case and the present cases. It reads as follows:

"2. A solvent railroad cannot abandon the operation of an unprofitable branch without the consent of the authority which created it, even though there is no general public demand for such operation."

There is a Kentucky statute which is discussed in the case and which requires railroads to operate branches of more than five miles in length, and this particular branch was held by the Court to be within that class. A number of cases are cited in the opinion rendered in this Kentucky case, but the only bearing that the principles discussed in them have upon the issue involved in the present cases is that in so far as the decisions may be based upon protection given by the 14th Amendment, they show that that amendment is applicable as a protection against the enforcement of unprofitable operations upon a railroad company. This question was expressly made the basis of the decision in *Jack vs. Williams*, 113 Fed. 823, in the Circuit Court of the United States for the District of South Carolina. In that case the state on relation of interested parties undertook to force the defendants to maintain and operate a railroad line at an actual loss. Judge SIMONTON said (p. 827):

"A railroad is, in a sense, a public concern. To its construction and operation the action of the sovereign is needed. * * * The consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public the road must be kept up in such a condition that life and property both must be made as safe as practicable. The rates of transportation of persons and freight must be reasonable and a reasonable number of trains must be kept up, dependent upon the circumstances surrounding the railway. Whilst thus serving the public, however, no corporation nor private person is obliged to continue the service without a reasonable remuneration. No one can be compelled to serve the

public for nothing. Private property of no kind, including railroad property, can be used for public purposes without compensation. *Smyth vs. Ames*, 169 *U. S.* 467, 18 Sup. Ct. 418, 42 L. Ed. 819; *Road Company vs. Sanford*, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560; *Chicago M. & St. P. R. Co. vs. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. Ed. 970; *Railway Co. vs. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. All these cases determine that a railroad company in the full enjoyment and use and capacity to use its franchises cannot be compelled to exercise its franchises without reasonable remuneration. *A fortiori* a railroad company, or a person owning a railroad, cannot be compelled to operate that railroad not only without remuneration but at a loss. And this is not by any means because such corporation or person is insolvent. If a citizen has the wealth of the Rothschilds he cannot be compelled to use a dollar of his wealth for public purposes without compensation. What then is a person to do who becomes possessed of wholly unproductive railroad property? Sell it? * * * Repair it and put it in condition? But experience has shown that even when it was a new road and required no expense for repairs it barely paid operating expenses. Could the state or the public, in the face of the 14th Amendment, compel such expenditure involving certain loss?"

The Court refused to compel the defendants to maintain and operate the road. This case was affirmed in 145 Fed. 281. See also

Commonwealth vs. Fitchburg R. Co., 12 Gray, 180;

Sherwood vs. A. D. R. Co., 94 Va. 291, 26 S. E. 943;

Ohio & M. R. Co. vs. People, 120 Ill. 200, 11 N. E. 347;

Northern Pac. R. Co. vs. Washington County, 142 U. S. 493, 35 L. E. 1092;
State vs. Old Colony Trust Co., 215 Fed. 307."

The 14th Amendment has been so frequently appealed to for protection against rate regulations imposed upon public utilities, theretofore operating under pre-existing franchises that we naturally have in mind those cases, when the 14th Amendment is appealed to by a public utility in a rate case. The cases last referred to show that the 14th Amendment applies with equal force as a protection against the enforcement of any alleged duty to continue to operate where the operations cannot be carried on at a profit. It is immaterial for the purposes of the present cases to consider whether a railroad company may be forced to operate an unprofitable branch, if the operation of that branch at a loss will not result in a loss upon the operation of the entire system; nor to consider those cases where reasonable regulations are imposed under the police power other than rate regulations. The only difficulty in applying the 14th Amendment in the present cases arises out of the suggestion that relief given under the 14th Amendment to the company would be relief against the company's contract. If that contract was a business or a proprietary contract the 14th Amendment would not apply. The franchise grants are not business or proprietary contracts, but are legislative enactments. They confer rights and privileges which the grantee and its successors are entitled to have protected under the contract impairment clause of the Federal Constitution; but being legislative enactments, the 14th Amendment applies as soon as it appears that the enforcement of such legislative enactments will result in the enforcement upon the street railway company of confiscatory rates of fare.

So soon as the company frees itself from the charge that it is undertaking to maintain the benefits of a franchise grant or contract, and at the same time is undertaking to escape

the burdens of such grant or contract, the enforcement of the objectionable legislation or action by the state comes within the spirit and intendment of the 14th Amendment.

The fact that the company had been, and at the time of the commencement of these actions was, engaged in supplying electricity for light and power for domestic and commercial use and power for war and industrial purposes in the City of Columbus and its suburbs (Record No. 739, p. 6), as well as operating street railway lines in the same territory, does not adversely affect the rights of appellants in these cases, for the following reasons:

(a) As averred (Record No. 739, p. 8) and by demurrer admitted to be true, the enforcement of the street railway rates would deprive appellants of their property without due process of law, and would render the further operation of *all* of the company's property not only impracticable, but impossible, both financially and otherwise, because the cost thereof, including taxes, depreciation and bond interest, *would far exceed its entire earnings received from all sources, and would soon reduce it to bankruptcy.* (Record No. 739, p. 9.)

(b) For the reason just stated, it is not financially possible, even if it were legally permissible, for the company to use revenue derived from the light and power department to make good the admitted losses in the street railway department.

(c) So far as the company is engaged in the light and power business as alleged in the bills, it was and is within the jurisdiction of the Public Utilities Commission of the State of Ohio, and subject at all times to its control and regulation in respect to rates and otherwise.

(d) The fact that the company is engaged in two kinds of public utility business is no bar to its right to reasonable compensation in each. Therefore, even if the company derived a profit from its light and power department the revenue so derived could not lawfully be appropriated to

pay the losses sustained in its street railway department. Each branch of the business must stand upon its own basis. The reports are full of cases where this has been very clearly established. *See Northern P. R. Co. vs. North Dakota ex rel. McCue*, 236 U. S. 588, 59 L. E. 735; *Norfolk & Western R. Co. vs. Conley*, 236 U. S. 607, 59 L. E. 746, and the numerous cases therein cited.

A very analogous case is *Knoxville Gas Company vs. City of Knoxville*, 253 Fed. 217, decided by the District Court for the Eastern District of Tennessee on September 23, 1918. The gas company filed a bill against the city asking for an injunction to restrain the city from enforcing the rates prescribed in the franchise grant under which it was operating. The first two points in the syllabus are as follows:

> "1. The voluntary acceptance by a gas company of an ordinance granting it a franchise on condition that it should never charge more than a stated price for gas to consumers created a contract which, if within the powers of the city, is binding on the company during its term.
>
> "2. A contract between a gas company and a city fixing a maximum price to be charged by the company for gas, if reasonable and valid when made, cannot be set aside by a court of equity as confiscatory and unconstitutional because subsequent conditions have made such rate unremunerative."

The court analyzed the grant and its acceptance and held that a contract was entered into, and that a court of equity could not relieve the company from its contract voluntarily and understandingly made. It appeared that the ordinance in Section 7 contained an express provision to the effect that the gas company shall at all times furnish gas to the people of the city and shall never charge for the same more than $1.10 per thousand cubic feet. This was an express agreement on the part of the company and differs

from the franchise grants in the present cases, which are permissive only, authorizing the company to occupy the streets and furnish street railway facilities and stating that it shall be entitled to charge the specified rates. The Knoxville Company did not undertake to surrender this franchise.

In this Knoxville case the court discussed (p. 223) two classes of powers possessed by municipal corporations, the one governmental and the other business or proprietary, and said:

> "The contract here is ordinancial in form, in the making of which I think the city officials were in the exercise of their business or proprietary functions."

The legislation under which the city acted was not very dissimilar from the legislation in Ohio, under which the City of Columbus acted in granting the two franchise grants, under which the present company operates, but, under the authorities heretofore cited, it seems absolutely clear that these two franchise grants were legislative enactments and not proprietary contracts. The 14th Amendment has no application to business or proprietary contracts. Such contracts do not represent state action and the 14th Amendment prohibits the *State* from depriving any person of his property without due process. Under the theory adopted by the District Court in this Knoxville case, the 14th Amendment naturally had no place. In this case there was no consideration of the line of cases herein cited under IV and sometimes referred to as war emergency cases. For these reasons it seems clear that the present cases can be distinguished from this Knoxville case.

SUMMARY

Plaintiffs and appellants rely upon three propositions to sustain their claim that they are entitled to have the decrees entered in the lower court in these cases reversed. Their first proposition is that, if the language of the franchise grants is to be given its natural interpretation, these grants are permissive only and the company was justified

in surrendering and abandoning them, with the result that the situation is the same as it would be if these franchises had expired by lapse of time, or if they had been forfeited. If it should be held that some adequate reason must be given for the surrender and abandonment of these franchises, such reason exists in the present cases, because the rates, although reasonable when originally prescribed, had become unreasonable and confiscatory when the franchises were surrendered and abandoned on August 20, 1918.

The second proposition presented by plaintiffs and appellants is that, independent of the surrender and abandonment of these franchises, the war has created an unexpected contingency not contemplated by the parties when the grants issued and were accepted, and that this unexpected contingency presents a vital, radical and material difference in the performance of these franchise grants, with the result that the obligations of the contracts represented by these grants are no longer in force.

The third proposition is that the enforcement of the rate schedules prescribed in these franchise grants will result in the taking of private property for public use without just compensation, that is, that the company will be required to serve the public with street railway facilities at confiscatory rates, which will in effect deprive it of its property without due process of law in violation of the 14th Amendment.

Plaintiffs and appellants respectfully submit that the decrees in the above entitled cases should be reversed and that the prayers of the bills in said cases should be granted.

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